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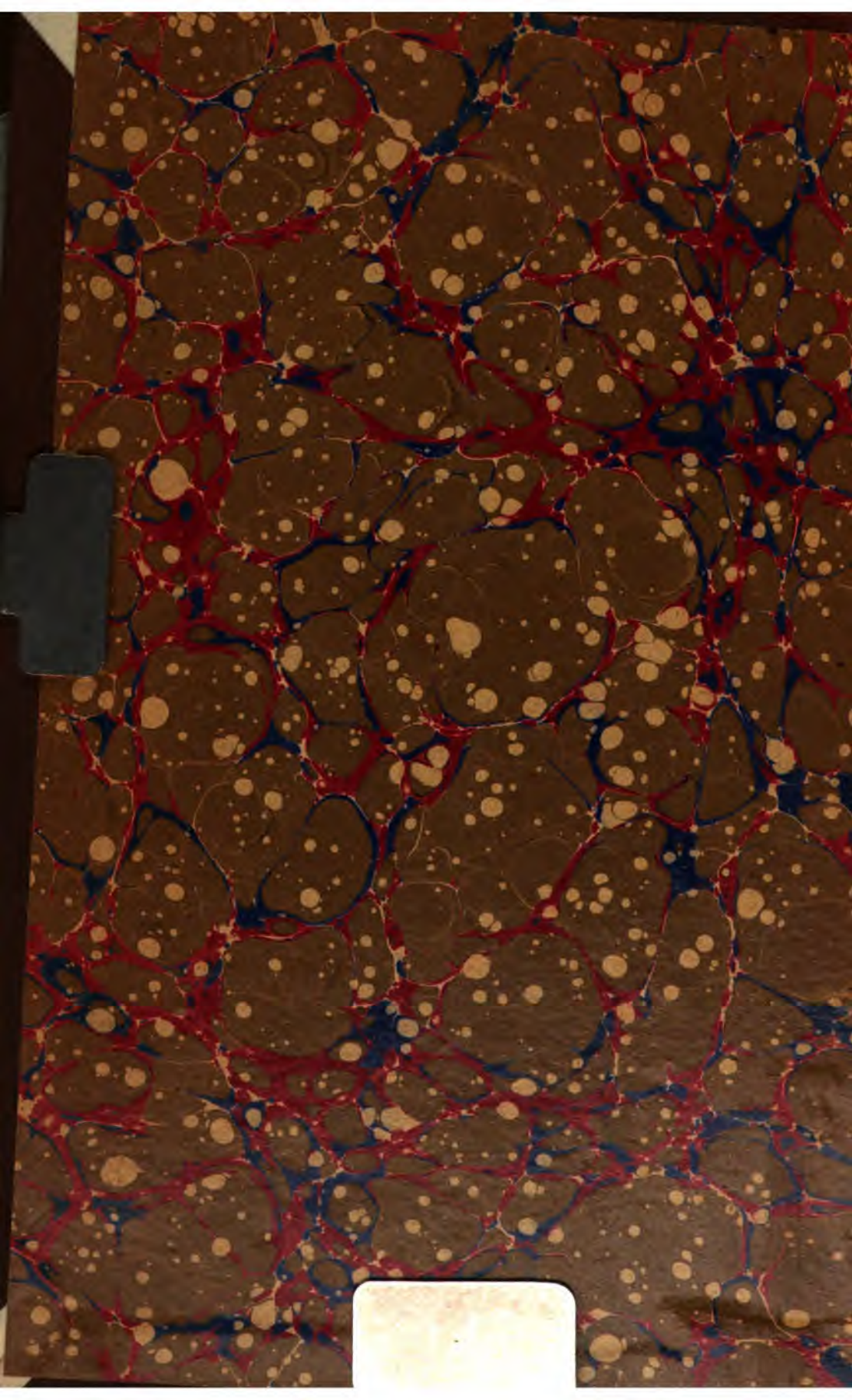
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# THE LAW QUARTERLY REVIEW.

EDITED BY SIR FREDERICK POLLOCK, BART., M.A., LL.D.,

*Corpus Professor of Jurisprudence in the University of Oxford.*

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# THE LAW QUARTERLY REVIEW

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No. XXIX. January, 1892.

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## NOTES.

THE portrait of the Editor which appears as a frontispiece to the volume commenced with this number is from a photograph taken last winter by Messrs. Elliott and Fry, of Baker Street, London.

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Letters and books intended for the Editor of this REVIEW *should not be sent to Oxford* if the senders wish to avoid delay. They should be addressed to London, either to the care of the publishers, 119 Chancery Lane, or direct to Sir F. Pollock, at 13 Old Square, Lincoln's Inn.

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British subjects will be well advised not to publish foreign literary or artistic works in England because they cannot find them registered at Stationers' Hall, or to defend actions for piracy because the plaintiff was not registered at Stationers' Hall before the issue of the writ, in reliance on the judgment of Stirling J. in *Fishburn v. Hollingshead* ('91, 2 Ch. 371) cited without dissent in the last number of the LAW QUARTERLY REVIEW at p. 301. In that case Stirling J. undoubtedly expressed an opinion that the foreign author of a painting could not sue in England without registering under the English Copyright Acts: but this opinion was clearly *obiter*, as the learned judge also decided that the work before him was properly registered in England. It has since been doubted by Smith and Grantham JJ. in the argument in *Moul v. Groenings*, '91, 2 Q. B. 443 (though the doubt is not reported), and Judge Martineau has felt himself justified by that doubt in declining to follow it in the case of *Moul v. Devonshire Park Co.* (*Law Times Paper*, Sept. 19, 1891).

The point is one of great importance, as, if Stirling J. is right, the British Legislature has failed to carry out the intention of the Berne Convention, which was that an author who complies with the formalities required by law in the country where he first publishes his work should thereby obtain copyright in the foreign countries, parties to the Convention, without also having to comply with the formalities in each of such countries; [Article 11 of Berne Convention]. This benefits the British author equally with the foreigner; the only person aggrieved is the pirate, and the great feature of the Berne Convention is that for the first time it treats copying other people's work as at the risk of the copyist, instead of impeding the author by technical restraints.

The Copyright Statutes on the point are, as the LAW QUARTERLY REVIEW observed, an 'ungodly jumble,' but the point admits of being shortly stated.

1. The Act of 1842 (5 & 6 Vic. c. 45, § 24) required Registration of Copyright as a condition for bringing an action for its infringement.

2. The International Act of 1844 (7 Vic. c. 12, § 19) provided that Copyright in a work first published out of Her Majesty's dominions should only be obtained under the provisions of that Act; and provided that the Queen might by Order in Council confer on authors of countries named therein the same benefits as they would have under the English Copyright Acts. The Act further required (§ 6) every such foreign author to comply with certain formalities of registration, differing from those of the Act of 1842, as a condition of obtaining the benefit of the Act of 1844.

Pausing here for a moment, it has never been suggested that a foreign author before 1886 ought to register both under the Act of 1844 and under the Act of 1842, though it might be argued that as the benefits of the English Acts were conditional to English subjects on their registering under those Acts, a foreigner taking the same benefits as an Englishman must also register under the English Acts.

3. The Art Copyright Act of 1862 (25 & 26 Vic. c. 68, § 12) included the provisions of the International Act of 1844, while providing that English authors of paintings, &c., must register at Stationers' Hall, and that any proprietor should not be entitled to the benefit of the Act until registered, and could not sue for anything done before registration. The Act of 1844 had included provisions for the registration of works of art.

4. The International Copyright Act of 1886 (49 & 50 Vic. c. 33, § 4) provided that when any Order in Council was made by her Majesty under the International Copyright Acts, the provisions of

those Acts as to the registry and delivery of copies of works should not apply to works under the Order in Council except so far as provided by the order.

5. The Order in Council of November 28, 1887, made under this Act, contains no provision as to registration and delivery of copies, and incorporates the Berne Convention of September 5, 1887, which in Articles 2 and 11 appears to show an intention that 'the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work' shall give an author copyright throughout the countries of the convention.

It seems fairly clear therefore that the provisions of the International Copyright Acts as to registry and delivery of copies do not apply to foreign works, by reason of Section 4 of the Act of 1886. But it is suggested that, as the foreign authors take the same benefits as they would have had under the English Acts, they are liable to register and deliver copies under the English Acts. But if this were so, foreign authors before the Act of 1886 would have been liable to register both under the English and the International Acts, and, still worse, to deliver copies both under the English and the International Acts; and authors of foreign books at the present time are liable to deliver five copies to certain libraries as an English author is. This consequence is so startling, and, as regards the practice before the Act of 1886, so contrary to the facts, as almost to prove its error. But it would seem clear that the provisions of the International Act of 1844 supersede instead of supplementing the provisions of the English Acts of 1842 and 1862; and that the effect of the Act of 1844 being in its turn superseded by the Act of 1886, is not to revive the old provisions, but to leave the foreign author to register in his own country, obtaining thereby copyright under the convention throughout the countries under the convention. And apart from the construction of statutes, the hardship would appear to be if Mr. Justice Stirling's decision is right. Under the Art Copyright Acts an author cannot sue for infringements which have preceded registration; registration is to that extent a condition of the right as well as of the remedy. It is said that there is a hardship on the 'innocent copyist,' who has had no notice of copyright. I may be permitted to doubt the existence of the 'innocent copyist,' whom I have not yet met in my experience of copyright cases. I have met the tradesman who desires to get his wares cheap, without too scrupulous inquiry as to the cause of their cheapness, and in many cases with direct knowledge that he is copying some one who he thinks has omitted to technically protect his rights, but I do not feel much sympathy with him. In any case this class of person

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will be well advised not to place too much reliance on *Fishburn v. Hollingshead*, '91, 2 Ch. 371. T. E. S.

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The belated appearance of the December number of the Law Reports compels us, as usual, to be very summary in our notes of cases reported in that number.

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The decisions of the House of Lords in *Smith v. Baker & Sons*, '91, A.C. 325, and *Johnson v. Lindsay & Co.*, *ib.* 371, are both useful so far as they go, but they both show the grave imperfection of our legislative methods. For they both deal with important points which were left as uncertain as ever by the Employers' Liability Act of 1880. *Smith v. Baker* has set bounds, not too soon, to the doctrine of *volenti non fit injuria*, which almost threatened to bring back the old rule of 'common employment' by a side-wind. People who sling stones in a crane are bound to use due care not to drop them on other people's heads, and not the less because those others may be employed by them in the same place to drill other stones or rock. And the fact that a man on whom a stone is thus dropped knew that there was such a danger may be evidence, but is not conclusive evidence, to show that he willingly exposed himself to the risk and was content to take it as 'all in the day's work.' As the House of Lords arrived at this conclusion with great labour, and not unanimously, we dare not call it obvious. Lord Morris's remarks (at p. 368) to the effect that *Thomas v. Quartermaine*, 18 Q.B.D. 685, would have been better decided as a case of no negligence at all, seem to us both just and weighty. *Johnson v. Lindsay* is a much simpler case: the facts clearly did not come within any of the timidly minute categories of the Employers' Liability Act, and the question was whether the plaintiff, a builder's workman, was or was not a fellow-servant of the men who dropped a bucket on him, and whose immediate employers had contracted with the architect and were not paid or in any way controlled by the builders. The House of Lords held that he was not a fellow-servant of the negligent persons, and therefore could recover against their masters. Our only difficulty is to understand how the Court of Appeal had persuaded themselves that he was. However, it ends well. 'Every good man could wish,' as the late Serjeant Arabin said, that so learned and accomplished a judge as Lord Watson had not revived the abuse of the word 'collaborateur' in this connexion. Thus used, it is neither good French nor any sort of English, and we have too much respect for good Scots to believe even on Lord Watson's authority that Scots will allow it.

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The head-note to *Seale-Hayne v. Jodrell*, '91, A.C. 304, is in these terms: 'The decision of the Court of Appeal (44 Ch.D. 590), upon the construction of a will and codicils, affirmed.' We are informed that 'the will and codicils and the material facts are set out in the report of the decision below,' and the report of the decision in the House of Lords does not tell us at all, save by this reference, what the words construed were. Well—it is a short head-note for once.

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*The Commissioners, &c., of Income Tax v. Pemsel*, '91, A.C. 531, in effect decides three points. *First*, a mission to the heathen is a charity, and funds held in trust for such mission are applied to a charitable purpose within 5 & 6 Vict. c. 35, Sched. A. s. 61, No. VI. *Secondly*, such funds when derived from the rent of land are exempt from the payment of income tax. *Thirdly*, in construing Statutes, such as the Income Tax Acts, which apply to the whole United Kingdom, words such as 'charitable purposes' may be given as applied to Scotland, a technical sense which they possess under English law (on this point see the language of Lord Macnaghten, '91, A.C. pp. 579, 583). Each of these three propositions is, it is submitted, open to criticism; none of them commanded the assent either of the Lord Chancellor or of Lord Bramwell. It may, however, be admitted that any interpretation which could possibly be given to the term 'charitable purposes,' as used in the Income Tax Acts, is open to grave objections. The moral to be drawn from *The Commissioners, &c., of Income Tax v. Pemsel* is that no part of English law is so unsatisfactory as that portion which consists of loosely-drawn statutory enactments interpreted by judicial subtlety. A vague consciousness of this fact accounts for much of the opposition entertained by sensible lawyers to large proposals for codifying the common law.

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A trustee has trouble enough already without keeping a register of incumbrancers for the benefit of persons who may think of lending money to his cestui que trust. He may very well say, 'As trustee I owe you no duty and I decline to answer inquiries.' But suppose instead of a respectful negative the trustee chooses to answer the inquiry, is he not bound to take proper care in doing so? Lord Eldon thought so in *Evans v. Bicknell* (6 Ves. 174), Lord Campbell and Knight Bruce and Turner L.J.J. thought so in *Slim v. Croucher* (1 D. F. & J. 518), Chitty J. thought so in *Cann v. Wittson* (39 Ch. 39), North J. thought so in *Low v. Bouverie* ('91, 3 Ch. 82), but the Court of Appeal has felt itself constrained by *Derry v. Peek* to reverse his decision. *Derry v. Peek*, like the



genie in the Arabian Nights that issued from the casket, seems growing till it threatens to overspread the whole legal horizon. Strictly *Derry v. Peek* only decides that in an action of deceit the plaintiff must prove actual fraud. Lord Herschell expressly puts aside *Burrowes v. Lock* (10 Ves. 470) and that class of cases as belonging to a different category. *Burrowes v. Lock* was no doubt a case of estoppel, but to say that estoppel is a mere rule of evidence does not conclude the matter. Technically it may be so, but ultimately it rests on a duty in a person within whose special province it lies to know a particular fact, as Lord Herschell puts it, to use care in making statements respecting it, and the fact that the duty takes the form of estoppel is due to the circumstance that the Court of Chancery was not in the habit until quite recently of giving damages. It certainly seems incredible that a person should be under no duty to use care in making statements as to matters within his special cognisance 'upon the faith of which,' as Lord Selborne said in *Brownlie v. Campbell* (5 App. Cas. 936), 'he knows the other man is going to deal for valuable consideration.' The result is that *Slim v. Croucher* is held by the C. A. to be no longer law; that *Burrowes v. Lock* is maintained only on the ground of estoppel; and that it may become slightly more difficult to raise money on equitable and reversionary interests, which perhaps is not a bad thing. The actual decision may stand, apart from the wider controversy of *Derry v. Peek*, on the ground that the defendant did not really purport to make a comprehensive statement, but only to mention the incumbrances on the trust fund then within his memory, without denying that there might be others. If that is the true reading of his letters, he could not have been held liable without making it highly perilous for a trustee to answer inquiries at all.

*Re Swain* ('91, 3 Ch. 233) is another case which will be welcomed by trustees. It seems indeed the very case which the limitation-of-actions-section in the Trustee Act, 1888, was designed to meet. There was no fraud, only a common and very venial breach of trust in not selling off a farming business at the solicitation of the widow. The plaintiff, a son, ingeniously tried to escape the bar by arguing that the action was to recover a legacy and not damages, but in vain. Human nature looks very ugly in some of these trustee cases. Even the legal mind recoils from the incredible baseness of soliciting a trustee to commit a breach of trust and then turning upon him when a loss has been incurred.

The tendency of some judges unconsciously to narrow or cut down the effect of *Derry v. Peek*, 14 App. Cas. 337, is worth notice. 'To

my mind,' says Lord Esher M.R., 'the decision in that case turned on as simple a point of law as possible, viz. that in order to maintain an action for the effect of a misrepresentation you must shew that it was a fraudulent misrepresentation.' (*Tomkinson v. Balkis Consolidated Co.*, '91, 2 Q. B. (C. A.) 614, 620, with which compare the language of Bowen L.J. in *Low v. Bouverie*, '91, 3 Ch. (C. A.) 82, 105.) Now this judicial dictum is in one sense true past contradiction, but it is open to two observations. If the point decided by the House of Lords in *Derry v. Peek* was really as simple as possible, how does it happen that the Court of Appeal, consisting of three very eminent judges, took a different view of the law from the House of Lords? Respect for the Court of Appeal absolutely prohibits the belief that they went wrong on a matter of law which was really as 'simple as possible.' Is it, in the next place, really true that *Derry v. Peek* decides nothing more than this simple point? Surely it, at any rate, implies not only that an action for fraud does not lie for a misrepresentation, which, though negligent, is not fraudulent, but also that no action whatever lies under ordinary circumstances for misrepresentation based on the grossest negligence. We fear this is now law, though bad law.

It is practically certain that in the Trades Union cases (*Gibson v. Lawson*, *Curran v. Treleaven*, '91, 2 Q. B. 545) the Queen's Bench Division carried out the actual intention of Parliament as to what should constitute 'intimidation' within the Conspiracy and Protection of Property Act 1875. This being so, a contrary decision could only have led to heartburnings and controversial letters, and an amending Statute scrambled through at the fag-end of the session; and we may well be content as citizens. But as lawyers we cannot help observing that, when a later Statute materially varies the language of an earlier one which it repeals and substantially re-enacts, the natural inference is that the variation means something; and, if the Court may not judicially read Hansard, we doubt whether judicial notice of 'the changing temper of the times on this subject' be a strictly legitimate substitute. It will also be observed that the Court, without any express comment, refused to follow *Judge v. Bennett*, 36 W. R. 103, a case of technically co-ordinate authority. However, the upshot is that a man does not 'intimidate' within the Act who threatens and procures the commission of a civil wrong, such as simultaneous breach of contract by a body of workmen, without breach of the peace. *Qu.* whether a civil action might not lie against him on the principle of *Lumley v. Gye*? This question remains quite open, and on some future occasion it may well become material. Meanwhile it might be interesting to know how the word

*minaccia* is interpreted in the substantially similar provisions of the Italian Penal Code, ss. 165, 166. The reference to Hansard invited by the reporter's note at p. 556 is not uninformative. The House of Commons was warned by Sir Henry James (himself counsel for the appellant Curran in this case) that the undefined use of the word 'intimidate' would lead to difficulties. But it was late in the session, and so the House of Commons chanced it, and the Act of 1875 passed as it stands.

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In *Dashwood v. Magniac*, '91, 3 Ch. 306, C. A., the majority of the Court gave effect to a local usage, within a county where beech trees are timber by custom, of thinning beech woods periodically, and of treating the proceeds, including those of other timber trees mixed with the beech woods and cut in the same course of forestry, as income. The case is a curious and interesting one, and the judgments, especially that of Bowen L.J. (where Vangerow's honoured name is grievously misprinted Valgerow), will be found excellent reading by those learned gentlemen (a class not diminishing, we believe) who have time to read their reports leisurely. The Law Reports head-note states everything except what was the point decided.

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'The principle of law that a man who wrongfully parts with goods is liable as if he had them still in his possession' (Willes J., at p. 254 of L. R. 1 C. P.) has been maintained by the C. A. in *Bristol and West of England Bank v. Midland Ry. Co.*, '91, 2 Q. B. 653. Reduced to its simplest terms, the defence was this: 'Before your title accrued we delivered to a person who had no title.' The continuity of lawful title is a mainstay of the law of property, and the Court has most justly refused to fritter it away.

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A corporation cannot commit a crime in the proper sense, but it can incur penalties by omitting to perform positive duties; and an application for a summons against an incorporated company in respect of such an omission is a 'criminal cause or matter' (Judic. Act, 1873, s. 47) in which an appeal does not lie beyond the Queen's Bench Division. *Reg. v. Tyler and International Commercial Co.*, '91, 2 Q. B. 588, C. A. We do not profess to understand the policy which deliberately disqualified the Court of Appeal from dealing with the branch of the Common Law most nearly touching the liberty of the subject, the protection of person and property, and the performance of public duties.

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*Wiedemann v. Walpole*, '91, 2 Q. B. (C. A.) 534, is full of comfort for persons accustomed to leave their letters unanswered. To this numerous class nothing could seem more alarming than the doctrine that if *A* does not answer *B*'s letter he thereby confirms any charge which *B* has been pleased to make in the letter. This view, adopted as it was by so eminent a judge as Baron Pollock, threatened to nullify the protection provided by 32 & 33 Vic. c. 68, s. 2, against groundless actions for breach of promise of marriage, and it is pre-eminently satisfactory to know that this enactment as construed by the Court of Appeal, has the effect which every ordinary layman supposed it to have, namely that no plaintiff could recover a verdict in an action for breach of promise simply on the strength of the plaintiff's own bold assertions or own reckless letters. A doubt may be entertained whether the learned Baron's opinion substantially differed from that of the Court of Appeal. He may very well have thought it right to prevent further litigation by letting a possibly dubious question of law come before the Court of Appeal in a shape which enabled them finally to decide the whole matter in dispute between Miss Wiedemann and Mr. Walpole.

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The master of a German ship carrying a cargo shipped by British subjects under an English bill of lading from Singapore to London, sells part of the cargo at the Cape under circumstances which justify his act according to German, but do not justify it according to English law. His liability is under these circumstances to be determined in accordance with the law of the flag, i. e. German law. This is the effect of *The August*, '91, P. 328. The judgment of Sir James Hannen is, as it appears to us, a legitimate application of the principles laid down by Willes J. in *Lloyd v. Guibert*, L. R. 1 Q. B. 115. It is satisfactory to find that eminent judges fully recognise the authority of a case which on one point at any rate connected with the conflict of laws provides the perplexed student of a difficult topic with clear guidance.

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The principle established by *Hick v. Rodocanachi*, '91, 2 Q. B. (C.A.) 626, is that where persons have undertaken to do a particular thing, in the particular case to unload a cargo, within a 'reasonable' time, the 'reasonableness' of the time for doing the act depends upon the circumstances which exist at the time when the act has to be done. From this principle it follows that if the consignees of goods which under a bill of lading must be unloaded within a reasonable time are delayed by a strike for which they are not responsible they are not

liable to the shipowner for the delay. What is rather odd is that in a good number of cases the judges have shown a tendency to hold that a reasonable time for unloading cargo means a reasonable time under ordinary circumstances (see *Wright v. New Zealand Shipping Co.*, 4 Ex. Div. 165), and that therefore a person who has undertaken to unload a cargo without fixing any definite time within which the discharge is to take place, agrees to do the work within a time which is reasonable under ordinary circumstances, and takes upon himself liability for delay caused for extraordinary circumstances which no man could foresee. Most persons will hold that the judges have at last worked round by a process of judicial legislation to a sound and sensible rule in harmony with the usual course of business. Students concerned with legal theory should note that *Hick v. Rodocanachi* is an example of the way in which contracts are gradually modified by implied obligations introduced into judicial decisions, and of the sagacity with which English judges, when time is allowed to them, and when they are not interfered with by legislation, mould the terms of a contract so as to make it correspond with the requirements of custom and of common sense.

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A question has been raised, how far an adjudication under the English Bankruptcy Act affects land in the colonies? This enquiry is answered by *Callender v. The Colonial Secretary of Lagos*, '91, A.C. 460. An adjudication of bankruptcy under the English Bankruptcy Act, 1869, applies to the whole of the British dominions, and therefore passes to the English trustee in bankruptcy the bankrupt's title to land situated in the colonies. The land, however, is, it would seem, transferred subject to the special requirements (if any) prescribed by the local law as to the conditions necessary to effect a transfer of land situated in a colony (compare *ex parte Rogers*, 16 Ch. D. 665). *Callender v. The Colonial Secretary of Lagos*, it is true, is decided under the Bankruptcy Act, 1869, but the grounds of the decision are, it is submitted, applicable to the Bankruptcy Act, 1883.

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It is difficult to deduce any general principle from *De Ricci v. De Ricci*, '91, P. 378. But that case, taken together with *Forsyth v. Forsyth*, '91, P. 363, show the very wide powers which in one way or another the Divorce Court exercises with regard to the variation of settlements. They also show how the general course of events which stimulates communication between the inhabitants of different countries makes it absolutely necessary for English Courts constantly

to deal with the recognition of rights acquired under foreign law. In *De Ricci v. De Ricci* first the Registrar, and then to a certain extent the Court, were called upon to consider the effect of the Code Napoleon on a marriage settlement which, though made by British subjects, avowedly adopted French law as determining the civil conditions of the parties to the contract. *Forsyth v. Forsyth*, again, determines that the Court may vary settlements of divorced persons, although both the petitioner and respondent were domiciled in Scotland at the time of their marriage and the settlements were made in Scotch form.

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We do not for a moment maintain that the judgment of Romer J. in *Coombs v. Wilkes*, '91, 3 Ch. 77, is erroneous. On the contrary, we are fully inclined to agree in his decision that the documents before him did not constitute a memorandum within the Statute of Frauds, s. 4. But *Coombs v. Wilkes*, just because it is rightly decided, raises the question which must often suggest itself to any one who has studied the 4th and 17th sections of the Statute, and the cases to which they have given rise, namely, whether these sections do not hinder rather than promote the maintenance of justice. The documents in *Coombs v. Wilkes* which do not satisfy the Statute are nearly enough, even taken alone, to satisfy any sensible man that the defendant did enter into the agreement which he cannot be compelled to perform, and a little additional verbal evidence might probably make this fact absolutely certain. Is it really worth while to guard against possible and uncertain frauds at the price of certainly encouraging dishonest breaches of contract? It is of course true that whatever good is worked by the Statute can by the nature of things not be visible to the public, for whenever it operates beneficially it prevents an unjust claim from being brought into Court. It is, however, equally true that in almost every case in which the operation of the Statute of Frauds is visible to the public it works injustice.

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*The Attorney-General v. Chapman*, '91, 2 Q. B. 526, determines the meaning of the words 'passing under' any past or future voluntary settlement in 44 & 45 Vic. c. 12, s. 38, and shows that where a power is created by a marriage settlement, and subsequently exercised by deed, the property to which the power refers passes under the settlement. The decision is in harmony with decisions under the Succession Duty Act. It also has the merit of cutting short attempts to escape the payment of duties on what are after all little

better than verbal quibbles. Judges are too apt to forget that the object of a taxing Act is to tax.

A summons in Chambers for the leave of the Court to pay addresses to a lady ward is not the most romantic commencement of courtship. Miss Lydia Languish would undoubtedly have objected to it strongly, and to anyone coming so recommended. Not so the lady in *Bolton v. Bolton* (91, 3 Ch. 270), whose admirer had obtained a 'courting' order on his undertaking to abide by the directions and orders of the Court. This lady was not only propitious, but ready to give away her fortune as well as herself to the suitor from the Court; too ready in fact, for between them they executed a settlement a few days after the lady's coming of age, giving them a joint power of appointment over the ward's property. This was not what the Court would approve, but the young lady had in the meanwhile become emancipated: so the Court, finding its control gone, wisely thought it best to say nothing about the matter: and as to the gentleman, in the first place he had received no orders from the Court to abide by, and in the next it was impossible, as Lindley L.J. observed, to restrain him from marrying without also restraining the lady. If a lady ward must not wed without the consent of the Court, neither must she, it seems, become the bride of the Church, in other words, a postulant or novice (*Re Gill*, 27 L.R. Ir. Ch. 129). This is important, for wards of the Court being generally dowered with this world's goods, are rather prize postulants.

The restraint on anticipation exists ostensibly to prevent a married woman being 'kissed or kicked' out of her property, but the area of its usefulness is not limited to this. Skilfully used it may be made to produce results which would have surprised Lord Thurlow. Thus it enables a married woman to give unlimited orders for gowns, bonnets, and jewellery, and then, when sued, to set up her incapacity to contract (*Braunstein v. Lewis*, 64 L.T.R. 265). It enables her to desert her husband without paying damages under the Matrimonial Causes Act 1884 (*Mitchell v. Mitchell*, '91, P. (C.A.) 208). If her husband gets a divorce from her she has only to marry again, thereby reviving the restraint, and the Court cannot decree maintenance to the wronged husband and the children. This last was the device which the Court of Appeal was invoked to frustrate in *Midwinter v. Midwinter* (40 W.R. 33) and it did its best to do so by directing an inquiry as to the wife's means so as to be prepared, on the decree being made absolute, with an order

to forestall her anti-marital manoeuvres. The unique advantage of the married woman's position is that she can use the restraint to discomfit her enemies, and when it suits her convenience she can get the Court to remove it (*Re Milner's Settlement*, '91, 3 Ch. 547).

Collins J. refused, after consideration, and in a case which went near to justify straining the law, to extend the doctrine of *Scott v. Sebright*, 12 P.D. 21, as to a marriage being null on the ground of coercion: *Cooper v. Crane*, '91, P. 369. *A*, whom *B* does not, on her own showing, love or care for, cannot be said to put coercion upon *B* by threatening to shoot himself. *B*'s proper course is to let him shoot himself—if he means it, which he probably does not. To allow *B* to marry *A* with apparent calmness and intelligence, and then plead coercion, would be to make the law dangerously lax, however badly *A* may have behaved.

In these days of agricultural depression an abortive sale is a by no means uncommon occurrence, and when the abortive sale is by a tenant for life under the Settled Land Act, the incidence of the costs becomes a matter of considerable importance: witness *Re Smith's Settled Estates* ('91, 3 Ch. 65), where the reserve price (not reached) was £97,000 and the costs £1171. After careful consideration of the Act, Kekewich J. following Stirling J. (*Re Llewellyn*, 37 Ch. D. 317) has laid down that such costs are payable out of capital, and may be raised by a charge on the inheritance. But the abortive attempt to sell must be made *bonâ fide*, otherwise a sanguine or spiteful tenant for life might go on loading the inheritance with the costs of abortive sales. A tenant for life in fact under the Settled Land Act has the rights but also the responsibilities of a trustee for all parties. It is when the part of trustee or *bonus paterfamilias* comes to be played by a ruined spendthrift as in *Marquis of Ailesbury's Settled Estates* (65 L.T.R. 409: Times, 14 Dec. '91) that the humour of the thing becomes apparent, recalling Master Dick's impersonation of his parent at 'the office' in 'Vice Versâ.' A tenant for life selling a few heirlooms as in *Earl of Radnor's Will Trusts* (45 Ch. Div. 402) to keep up the state of a place like Longford Castle is a minor matter, but when Charles Surface not content with putting his ancestors up for sale knocks down that 'unique historic possession' Savernake Park at the instance of an 'unconscionable dog' of a moneylender—well, the remaindermen may be allowed to feel aggrieved (even though the estate fetches a good price) not knowing, 'good easy men,' till now that the tenant for life is 'master of the situation' and entitled to 'override'



their 'sentimental interests.' The spectre which appalled the Court of Appeal was the mortgagee in possession, but if the remaindermen prefer this alternative, who else, pending the socialist régime, is concerned?

It may seem unfortunate that when a man has rendered himself liable to criminal proceedings, say by misappropriating moneys as secretary of a Building Society, his friends should not be able to come forward and say, 'We will make good the defalcations,' but so it is (*Jones v. Merionethshire Building Society*, '91, 2 Ch. 587). The public policy which avoids agreements to stifle a prosecution has a double aspect. To the prosecutor it says in the words of Lord Westbury, 'You shall not make a trade of a felony,' in other words, use it to blackmail the accused or his friends: to the accused and his friends it says, 'You must not interfere with the administration of justice.' But in either case the Court before it declares the agreement illegal has to be satisfied that the non-commencement or discontinuance of the criminal proceedings was the consideration for the agreement. Where friends are appealed to and come to the rescue as in *Jones v. Merionethshire Building Society* or *Williams v. Bayley* (L. R. 1 H. L. 200), the inference is almost irresistible that the assistance is rendered on the terms of no prosecution: not so where there are defalcations or a debt owing and the accused agrees to pay or give security, for *non constat* that in doing so he may not have been actuated by a desire to pay or secure a just debt and not by the threats. The qualification of the doctrine sanctioned by the high authority of James and Mellish L.JJ. in *Fisher v. Apollinaris Co.* (10 Ch. App. 297) must it would seem be confined to that class of quasi-penal offences such as libel and assault which are rather in the nature of torts than crimes or public offences.

*A* enters a close as a trespasser, mows the grass and leaves it for two days: then returns and carries it off 'animo furandi.' Is *A* guilty of larceny at common law? The Court for Crown Cases Reserved in Ireland (*Reg. v. Foley*, 17 Cox Cr. Cas. 142) have decided that he is (diss. Pallett C.B.), and this view is entirely in accordance with the early authorities (1 Hale P. C. 510: 2 East P. C. 587). 'If a man,' says Hale, 'come to steal trees or the lead off a church or house, and sever it, and after about an hour's time or so come and fetch it away, this hath been held felony, because the act is not continued but interpolated, and in that interval the property lodgeth in the right owner as a chattel.' *Reg. v. Townley* (L. R. 1 C. C. R. 315) may well be distinguished. Hiding rabbits in a ditch for

three hours is a different thing from leaving cut grass in a field for two days. In the case of the rabbits the occupier of the land has neither real nor apparent dominion in the interval. *Reg. v. Petch* (14 Cox C. C. 17, 38 L. T. R. 788) is a doubtful case just on the line. Gibson J.'s criticism puts the point neatly: 'Continuity of intention is not the same as continuity of possession.' Whether possession be continuous or not is a question of fact, subject to the rules of law by which possession can be acquired and lost only in certain definite ways. It has been pointed out over and over again that fraudulent misappropriation ought to be punishable whether there has or has not been a trespass *de bonis asportatis*. But meanwhile the Common Law is such as it is.

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Mr. Justice Maule was such a master of that figure of rhetoric known as irony that Jessel M.R. may well have doubted whether the naive interrogatory 'How does the mother of an illegitimate child differ from a stranger' (*Re Lloyd*, 3 M. & G. 547) was to be taken seriously. Legal rules like the 'filius nullius' pursued to their logical conclusion land us in moral anomalies, but human nature, when 'expelled with a pitchfork,' only returns in the form of equitable rules. A mother is a mother whether in wedlock or out of it. For natural affection does not flow only in the channels prescribed by legal relationship: hence her wishes are properly consulted as to the custody of her illegitimate child (*Barnardo v. McHugh*, '91, A. C. 388). Here at least it is so. In Scotland Mr. Legality, to use Bunyan's language, is still abroad notwithstanding the high illegitimate birth-rate there (perhaps because of it) and a mother cannot get damages against a railway company for causing the death of her illegitimate child (*Clarke v. Cartin Coal Co.*, '91, A. C. 420) because there is no obligation on the part of such child to 'aliment' its mother. Such 'unlawful productions,' as an old case severely says, are not to be 'encouraged.'

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When Sydney Smith once confessed to a desire to roast a Quaker, a solemn gentleman present, horrified at such a sentiment, exclaimed, 'But have you considered the pain, Sir?' 'Yes, Sir,' said the mischievous Canon, 'I have considered everything, and I still wish to roast one, only one,' &c. The Court of Queen's Bench in Ireland have considered the pain caused by dishorning cattle, and have come to the conclusion that its infliction is not 'unnecessary abuse' (*The Queen v. McDonagh*, 28 L. R. Ir. Q. B. 204). Seldom has a question been agitated like this one of dishorning cattle. It was held illegal in *Brady v. Argyle* (14 L. R. Ir. 174), then allowed in *Callaghan*

*v. Society for the Prevention of Cruelty to Animals* (16 L. R. Ir. 325), and in two Scotch cases (*Renton v. Wilson*, 15 Just. Cas. 84 on app. 2 *White's Just. Cas.* 43, and *Todrick v. Wilson*, 2 *White's Just. Cas.* 636), again held illegal in *Ford v. Wiley* (23 Q. B. D. 203), and is now again sanctioned in *The Queen v. McDonagh*, the result being that ten judges have declared themselves in favour of the practice, four against. Dishorning is an undeniably painful operation, excruciatingly painful, but it puts £2 a head on the market value, promotes the cattle traffic, and prevents the creatures goring one another at pasture or in transit. Hence it is certainly convenient, and if we start with the accommodating assumption that cattle are created for the service of man, possibly necessary in cattle dealer's logic. This major premiss, however, as to the final cause of cattle requires to be carefully examined, otherwise it opens the door to any sort of abuse that private cupidity may choose to inflict. What the latest Irish decision really comes to is, that painful or not, dishorning is very important to the Irish cattle traffic, and whatever England or Scotland may do, Ireland cannot afford to suppress the practice.

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An infant, who was *en ventre sa mere* at the time of the wrong complained of, bringing an action against a railway company for negligence is certainly an interesting novelty (*Mabel Walker v. Gt. Northern Ry. Co. of Ireland*, 28 L. R. Ir. Q. B. 69): but if that infant has come into the world a cripple in consequence of the Company's negligence, why not? When an unborn infant was spoken of as a nonentity Buller J. sarcastically remarked, 'Let us see what this nonentity can do. He may be vouched in a recovery, he may even be an executor. He may take under the Statute of Distributions. He may take by devise . . . He may have an injunction, and he may have a guardian' (*Thellusson v. Woodford*, 4 Ves. 321). Sir Robert Phillimore was clearly of opinion (though extrajudicially, as we now know) that such an infant, when born, might maintain an action under Lord Campbell's Act (*The George and Richard*, L. R. 3 Ad. & Ecc. 466). The statute (7 & 8 Vict. c. 85, s. 6) does not allow railway companies to charge for children under three. The Company's contract in such a case is, for the fare, to carry mother and child safely (*Austin v. Gt. Western Ry. Co.* L. R. 2 Q. B. 442). What seems to have influenced the Irish Court in allowing a demurrer to the action was the invisibility of the infant, but it is not clear what difference this makes. No doubt, as the Court pointed out, there might be difficulty in proving that the infant's injury was attributable to the accident, but this physiological difficulty is one which occurs in every case of railway injury,

and is merely a question of evidence for the jury somewhat more complicated than in the case of a person *in esse*. O'Brien J. contributed the ingenious suggestion that the mother is the common carrier of her unborn child.

To those who in the Lucretian spirit can joy '*e terra magnum alterius spectare laborem*' law need never be dull. The triumphant litigant gets his judgment. This is one thing: satisfying it by execution is another, especially when you have to deal with a rural sanitary authority, which proves itself a very Proteus in evading the shackles of the law (*Lord Jersey v. Uzbridge Rural Sanitary Authority*, '91, 3 Ch. 183). After trying in vain to attach a rate and, failing that, money which the said rural authority had borrowed under the Public Health Act to buy land for sewage works, Lord Jersey with his claim now fast dwindling by set-off of costs had recourse to that judicial writ of execution founded on the Statute of Westminster II, commonly known as an *elegit*, against the property purchased, only to find, after what Bacon V.C. described as 'a game of hide and seek' among the sections of the Public Health Acts, that property held by a local authority in trust for a contributory district as distinguished from property held in trust generally for public purposes cannot be seized for 'general' expenses. We must now await with interest the further development of the situation.

Though technicalities are no longer in favour, a defensive though unequal war may still by their aid be maintained. Thus committal and attachment are now for all practical purposes the same, but a notice of motion to commit, unlike one to attach, must still be served personally, and the defendant's appearing is no waiver of his rights (*Mander v. Falcke*, '91, 3 Ch. 488). A person whose liberty is threatened is entitled to 'the rigour of the game.'

The giant growth of joint stock companies goes on unchecked by ruthless legislation against directors and promoters. With a slight ebb during 1876-9 the number has been steadily rising since 1862, and last year the number registered reached the enormous total of 2789. Ireland it is satisfactory to note exhibits an increase from 67 in 1888 and 70 in 1889 to 96 in 1890. A marvellous microcosm of commercial activity is this Companies' Return, of British energy and enterprise in all its multitudinous forms and world-wide spirit of adventure. The key which has unlocked it is 'Limited Liability.' Unlimited companies are nowhere. The new unlimited companies are 7 as against 2711 limited. Next to limited liability in

stimulating joint stock enterprise is the reduction in the amount of shares which has enabled the promoter to fling his net wide and wider. Companies limited by guarantee exhibit the same steady, growth. They are convenient for Clubs, Trade Protection Societies, and philanthropic objects. Among them appears 'The Shipping Federation' and 'Hospital Saturday Fund.' Noticeable too is the number of companies, about 40 per cent., registered with a small capital, e.g. £10,000 or under. This promises a good deal of work for the County Court judges under the new winding-up jurisdiction, not to speak of transferred proceedings. Apropos of this the Court of Appeal has recently decided (*Reg. v. Judge of East Stonehouse County Court*, 92 L. T. N. 77) that winding up proceedings may be transferred whatever the amount of the company's capital.

Insolvency, according to the most recent Bankruptcy Report, is decreasing. The classes of bankrupts vary—last year it was the farmers and grocers, now it is the turn of the clerks, lodging-house keepers, and officers in the army—but the volume of insolvency is decreasing. This is good hearing, but it is not good hearing that the working of the Act results in a deficit of about £38,000 in that in 1399 out of 3652 estates liquidated in bankruptcy the dividend was nil, a fact, however, due to no fault of administration, but simply to the worthlessness of the estates which came into bankruptcy. If dividend-paying were indeed the sole test of bankruptcy administration, the game would not be worth the candle, but dividend-paying is not the sole test. The value of the Act consists in its disciplinary jurisdiction. The professional bankrupt and the reckless trader are beginning to discover that such things as not keeping books, rash speculations, and extravagant living entail the disagreeable result of having their discharge refused or suspended or saddled with vexatious conditions, while penal clauses lie in wait for graver offences. Out of 1419 applications last year for discharge only 85 were granted unconditionally, while there were 19 convictions. In this way the Act is educating the commercial conscience, unfortunately visiting dishonest trading and dealing gently with 'misfortune without misconduct.' The withholding of the discharge appeals less to the uncommercial conscience. Deeds of Arrangement, which are nearly as numerous as bankruptcies, are the real difficulty. When fair they are a more desirable form of liquidation than bankruptcy, besides being more to the taste of the trading community. But, as the Report shows, they are often scandalously abused, and estates capable of paying 20s. in the pound get off with 6s. 6d. or less. Creditors do not care to play the

Shylock, especially when assured that they will only lose by it, and it is next to impossible for them to find out the truth without initiating bankruptcy proceedings. There is now an Association which makes a business of seeing debtors through an arrangement, and has no doubt brought creditor-hoaxing to the perfection of a fine art. In any future legislation on bills of sale, the remarks of the Comptroller on their operation in defeating a bankrupt's creditors will require attentive consideration.

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The decision of the Queen's Bench Division in *Reg. v. Vice-Chancellor of Cambridge University* (Dec. 11, 1891, *Times* newspaper, Dec. 12) teaches us that in the proceedings of inferior Courts of Record regularity is better than euphemism.

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We beg to refer Mr. James Mackintosh, a learned contributor to the *Edinburgh Juridical Review*, October, 1891, who seems to think there is no doubt as to the common-law rules of bailment being Roman, to Mr. E. Schuster's article published nearly six years ago in this REVIEW (ii. 188). Mr. Mackintosh is still under the impression (belonging, we had thought, to a past age of innocence) that everything must be of Roman origin which Bracton described in Romanized language. As for Lord Esher's confident remark in *Nugent v. Smith*, it is enough to say that judges do not and cannot speak with authority on a question of this kind.

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The same writer, at the end of his article, takes occasion to say that 'the doctrine of contributory negligence was thoroughly elaborated by the Roman jurists.' We must deprecate this kind of extravagant eulogy of the Roman lawyers; it can only tend to confuse just appreciation of the great work they really did. So far as contributory negligence is treated of in the title on the *Lex Aquilia* and elsewhere, the treatment is perfectly sound, and on the right lines which the Common Law took up only many centuries afterwards. But an elaborate doctrine there is not.

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It would be premature to comment on the new scheme of lectures about to be started by the Council of Legal Education. Everything will depend on the working of it. On paper it is certainly better than the old one, and if it be worked with zeal and intelligence the Inns of Court may possibly, within a few years, be not much

inferior as a centre of legal instruction to an average second-rate American law school. So far as we are aware, the bulk of the legal profession in England remains in its usual and deplorable state of profound indifference and ignorance on the whole matter.

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Our learned and literary correspondents beyond seas would do us a favour if they would cease to suffer our name to be misspelt by their clerks. We are the LAW QUARTERLY REVIEW, not 'Quaterly,' which is a *vox nihili*, still less 'Lav-Quaterly,' which has sometimes occurred.

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*It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as afore-said, cannot be in any way answerable for MSS. so sent.*

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## THE CRITERIA OF JURISDICTION.

**T**HE rules of private international law—treated by me here as elsewhere<sup>1</sup> simply as a portion of the Law of England—are divisible into two parts.

The one part contains a set of rules for the choice of law; with this set of rules we are not in this article concerned.

The other part contains a set of rules for fixing the limit, on the one hand, to the jurisdiction of the High Court itself, and on the other to the jurisdiction which in the opinion of the High Court is rightly exercisable by the sovereign, or, in ordinary language, by the courts of a foreign country<sup>2</sup>. This set of rules determines, in effect, the occasions on which either the High Court or the court of some foreign country is in the opinion of English judges 'a court of competent jurisdiction'<sup>3</sup>. This is the set of rules with which the present article is concerned. It is written with the object of shewing that, though not the whole, yet nearly the whole, of these rules on jurisdiction, in so far as they are maintained by the High Court, depend upon, or are the expression of, two broad general principles

<sup>1</sup> See 6 L. Q. R. p. 1; 7 L. Q. R. p. 113.

<sup>2</sup> See 7 L. Q. R. pp. 119, 120.

<sup>3</sup> The term 'court of competent jurisdiction' is ambiguous.

i. It may mean a 'court belonging to a country whose sovereign may (in the opinion of the tribunal called upon to decide the matter) rightly determine or adjudicate upon a given case or class of cases.'

When used in this sense the term refers to the 'extra-territorial,' or as it is sometimes called, the 'international,' competence of the sovereign of a particular country when acting judicially or, in other words, of the courts of that country. Thus the courts of Saxony or the courts of Italy are 'courts of competent jurisdiction' to grant a divorce to married persons domiciled in Saxon or in Italian territory. The High Court, that is to say, holds that the King of Saxony or the King of Italy is competent, when acting in his judicial capacity, to divorce persons domiciled in his territory, and may grant to any or all of his courts authority to divorce such persons, and therefore that a divorce of such persons by a Saxon or by an Italian court ought (subject to exceptions which we need not here notice) to be held valid in England. The term 'court, or courts, of competent jurisdiction' is, unless the contrary is stated, used throughout this article in its extra-territorial sense.

ii. The term may mean 'a court to which the sovereign of a particular country has given authority to adjudicate upon a given case, or class of cases.'

When used in this sense the term refers to intra-territorial competence, and whether a given court of a particular country be in this sense a court of competent jurisdiction, or whether any of the courts of such country be in this sense courts of competent jurisdiction, is a matter depending wholly upon the law of the country in question. Thus whether a particular Saxon court be a court of competent jurisdiction to grant a divorce, or whether any Italian court whatever is, for the same purpose, a court of competent jurisdiction, must from the nature of things depend wholly upon the law respectively of Saxony and of Italy. With intra-territorial competence this article has no concern, and the term court, or courts, of competent jurisdiction is not used in this article in its intra-territorial sense.



which, as they determine the jurisdiction exercised by the High Court, or properly exercisable by the courts of a foreign country, may fitly be termed the *criteria* or *tests* of jurisdiction. With a view to establish the doctrine maintained in this article it will be necessary, first, to state and explain these leading principles, or criteria, of jurisdiction; secondly, to shew that the greater number of the instances in which the High Court undoubtedly itself exercises jurisdiction, or concedes it to foreign courts, are applications of these leading principles; and, thirdly, to examine the objections which may be brought against a doctrine which, in the precise form it assumes in this article, cannot claim the direct sanction of English judges or English text-writers.

## I.

### *Statement of Principles or Criteria.*

PRINCIPLE NO. 1.—*The sovereign of a country, acting through the courts thereof, has a right to adjudicate upon, or, in other words, has rightful jurisdiction over, any matter with regard to which he can give an effective judgment, and has no right to adjudicate upon, or has no rightful jurisdiction over, any matter with regard to which he cannot give an effective judgment.*

For the proper understanding of this principle attention should be paid to two preliminary observations.

*First.* Questions about the competence of the courts of a country are in reality, whatever the form may happen to be under which they call for judicial decision, questions about the judicial competence of the sovereign of the country. When, for instance, the High Court decides that a Saxon court is, whatever the authority given it by the King of Saxony, not a court competent to divorce persons domiciled in England, the High Court in reality determines that the King of Saxony is not, in the opinion of the High Court, competent to divorce married persons who have an English domicil. So again where the High Court decides that it has, in general, no jurisdiction to divorce persons not domiciled in England, the High Court in reality determines that the English sovereign is not competent, that is, ought not, to divorce married persons not domiciled in England.

There is of course this difference between the two cases. When the High Court is dealing with the jurisdiction, in matters of divorce, exercised by a Saxon tribunal, the court may, and does, refuse to give effect to any divorce which, in the opinion of the High Court, the King of Saxony, and therefore the court acting under his authority, was not competent to grant. When the High Court, on the other

hand, is dealing with the jurisdiction in matters of divorce which the court itself is called upon to exercise it must obey the commands of the English sovereign. If therefore an Act of Parliament, or some established rule of English law, gives the High Court jurisdiction to divorce persons not domiciled in England, it must exercise the power and perform the duty imposed upon it, even though the court may be of opinion that the English sovereign ought not to exercise jurisdiction, as regards divorce, over persons not domiciled in England<sup>1</sup>. No court, in short, can question the competence of the sovereign under whom it acts. This distinction, however, between the attitude of the court when dealing with the jurisdiction of foreign courts and its attitude when dealing with its own jurisdiction is, for our present purpose, of very subordinate importance. The High Court is very little fettered by Acts of Parliament when dealing with questions of jurisdiction, and in the main<sup>2</sup> follows the general principles which commend themselves to our judges. All that need be noted is that every court, and the High Court is no exception to the rule, naturally tends to claim for itself a jurisdiction wider than it holds to be in principle properly exercisable by other tribunals. Hence the High Court's mode of dealing with foreign judgments is a better test of the doctrine maintained by it as to the proper limits of jurisdiction than are the rules by which it has defined the boundaries of the High Court's own authority<sup>3</sup>.

*Secondly.* An 'effective judgment' means a decree which the sovereign, under whose authority it is delivered, has in fact the power to enforce against the person bound by it, and which therefore his courts can, if he chooses to give them the necessary means, enforce against such person. To look at the same thing from the other side, an effective judgment is a decree which gives to the person who obtains rights under it, an actual and not a merely nominal right, that is a right which, if aided by the sovereign whose court has delivered the judgment, he can enforce. A judgment which is not 'effective' means a decree which the sovereign under whose authority it is delivered has not in fact the power to enforce against the person bound by it, and which therefore the sovereign cannot, even if he choose, give his court the means of enforcing. To look at the same thing from the other side, a non-effective judgment is one which gives to the person who obtains rights under it a merely nominal right—that is to say, a right which he cannot even if aided by the sovereign under whose authority the

<sup>1</sup> See *Niboyet v. Niboyet* (1878), 4 P. D. 1.

<sup>2</sup> See, however, *Schibsy v. Westenholz* (1870), L. R. 6 Q. B. 155.

<sup>3</sup> See Rules of Court, 1883, Ord. XI.

judgment is delivered actually and in fact exercise. Thus if the King of Italy, or, to use ordinary language, an Italian court, gives a judgment entitling *A* to the possession of land at Rome which is occupied by *X*, the judgment is effective, since it can clearly, under the authority of the King of Italy, by means of Italian magistrates, policemen, or soldiers, be enforced against *X* in favour of *A*. If, on the other hand, an Italian court should give a judgment entitling *A* to the possession of land in London occupied by *X*, the judgment is clearly ineffective, for it cannot by the mere power of the King of Italy, his policemen, or his soldiers be enforced against *X* or in favour of *A*.

If these observations be borne in mind the meaning of general principle No. 1 becomes clear. It may be called the 'principle of effectiveness,' or from another point of view the 'test or criterion of effectiveness.' However it be named, it amounts simply to this: that the courts of a country, as representing the sovereign thereof, have a right, in the opinion of English judges, to adjudicate upon any matter with which they have in fact the power to deal effectively, and have not a right to adjudicate upon any matter with which they have not in fact the power to deal effectively.

Note that the authority of the courts of a country is nothing but the authority of the sovereign thereof. It will then be seen that the principle which regulates, as far at any rate as English courts are concerned, the judicial authority of a sovereign, is at bottom the same as the principle which regulates his legislative authority<sup>1</sup>.

The King of Italy, for instance, when acting as *legislator*, in general passes laws applying either to things situated and to transactions taking place in Italian territory, or to persons who are resident in Italy, or, if not so, are Italian subjects. Such laws he is fully entitled to pass, and they, or rather the rights acquired under them, are in general recognised by non-Italian, and especially by English courts. The King of Italy further can, of course, if he chooses, and occasionally does, pass laws intended to affect transactions taking place outside Italian territory, and persons who neither reside in Italy nor are Italian subjects. Such laws must be obeyed by Italian judges. But the King of Italy is not, according to the opinion entertained by English courts, justified in passing such laws, and these laws, or rather the rights acquired under them, will probably not be recognised by non-Italian, and certainly not by English, courts. The Italian sovereign ought, in short, to legislate about matters only which lie within his control, his legislative authority is limited by his executive power.

The King of Italy, when acting as *judge*, in general gives judgments

<sup>1</sup> See 7 L. Q. R. pp. 119, 120.

either having reference to things situated in his territory (e.g. land) or affecting, and enforceable against, residents in Italy or, at any rate, Italian subjects. Such judgments he is fully entitled to deliver, and they, or rather the rights acquired under them, are in general recognised by non-Italian and especially by English courts. The King of Italy, acting through his courts, can further, if he chooses, and not unfrequently does, give judgments intended to affect property which is not situated in Italian territory and persons who are neither resident in Italy nor Italian subjects. Such judgments will, of course, be delivered by Italian tribunals if ordered to do so by the Italian King and will be obeyed by every Italian official. But the King of Italy is not, according to the opinion entertained by English courts, justified in delivering such judgments; his courts are for this purpose not 'courts of competent jurisdiction,' and these judgments, or rather the rights acquired under them, will probably not be recognised by non-Italian, and certainly not by English courts. The sovereign ought in short to adjudicate upon matters which lie within his control or as to which he can deliver effective judgments. His judicial competence, no less than his legislative authority, is limited by his executive power. *Extra territorium jus dicenti impune non paretur*. Right is in both instances bounded by might.

The 'test of effectiveness' may also be regarded as an application of that general recognition of rights duly acquired under the law of any civilized country which is the true basis of all the rules of private international law<sup>1</sup>. These rules exist to ensure the recognition everywhere of rights duly acquired under the law of any civilized country. But the actual acquisition of a right is a matter of fact. A nominal right which cannot be enforced is not in reality acquired. The principle therefore that the jurisdiction of a court is to be recognised then, and then only, when the court can give an effective judgment is in reality little more than the rule that English judges will treat as acquired under, e.g. an Italian judgment, those rights and those rights only which the courts or, at bottom, the sovereign of Italy can enforce.

*Sub-Rule.*—When in any matter, e.g. divorce, the courts of no one country can give a completely effective judgment, but the courts of several countries can give a more or less effective judgment, those courts have a preferential jurisdiction which can give the most effective judgment.

This is a corollary to Principle No. 1. It has not often been distinctly formulated, but it accounts for more than one instance of what may seem an anomalous exercise of jurisdiction.

<sup>1</sup> See 7 L. Q. R. p. 113, General Principle 1; 6 L. Q. R. pp. 9-12.

To understand the bearing of this corollary let us contrast the effect of a judgment given by an English court as regards the possession of land in England with a judgment by an English court divorcing a husband and wife.

The judgment giving possession to *A* of land in London is as effective as the judgment of any court or the decree of any sovereign can by possibility be made. *A* or his representative may, and will, be put into occupation of the land by the servants of the court, and will not need for the enjoyment of his right as landowner the aid of any foreign tribunal. But if an English court declares *A* divorced from *M* the most that such judgment effects is that in England the parties have the rights of unmarried persons. The judgment cannot, of itself, secure that *A* or *M* shall be treated as unmarried in France or Italy, and conversely no sentence of divorce delivered in France can, of itself, secure that the divorced parties shall be treated as unmarried in England. Now the value of a sentence of divorce given, e. g. in England, depends upon the connection of the parties with England. If they belong to that country, if they habitually reside there, if it is their home or, in technical language, their domicile, then the English sentence of divorce is as effective as the sentence of the courts of any one country can be. It gives *A* and *M* the status of unmarried people in the country to which they belong, that is to say, in the country where it is, both to them and to the country itself, of most importance that their status as married or unmarried persons should be fixed. If, on the other hand, *A* and *M* are domiciled, say, in New York, the English sentence of divorce is, comparatively speaking, ineffective. Hence the rule that the courts of a person's domicile have at any rate jurisdiction, if not exclusive jurisdiction, in matters of divorce; and the same principle is, we shall find, applicable not only to all judgments affecting status, but also to jurisdiction in matters of succession.

PRINCIPLE No. 2.—*The sovereign of a country, as represented by the courts thereof, has a right to exercise jurisdiction, or, in other words, the courts of a country are courts of competent jurisdiction, over any person who voluntarily submits to their jurisdiction.*

This principle may be called the 'principle of submission,' or, from another point of view, the 'test' or 'criterion of submission.' It applies to every kind of civil jurisdiction. It amounts to this, that a person who voluntarily agrees, either by act or word, to be bound by the judgment of a given court or courts has no right to deny the obligation of the judgment as against himself.

To a certain extent Principle No. 2 may be treated as an application,

or result, of Principle No. 1. A person who agrees to be bound by the judgment of a court, e. g. by appearing as defendant, does often by this mere fact give the court the means of making its judgment effective against him. Still the principle of submission is, it must be admitted, often based upon grounds different from the principle of effectiveness. It is rather a portion, or development, of the rule that a person is bound by his contracts.

Submission, it should be noticed, may take place in various ways, e. g. by a party suing as plaintiff, by his voluntarily appearing as defendant, or by his having made it a part of an express or implied contract that he will, if certain questions arise, allow them to be referred for decision to the courts of a given country<sup>1</sup>. With the principle of submission which applies more or less to all actions we need concern ourselves but slightly. The main point to which attention should be directed is the extent to which the principle of effectiveness applies to different kinds of jurisdiction.

## II.

### *Application of Principles or Criteria to different kinds of Jurisdiction.*

1. *Actions in rem*.—In such actions jurisdiction admittedly depends primarily upon the *res*, e. g. the ship, being within the control of the court adjudicating upon the title thereto, or in strictness within the control of the sovereign under whose authority the court acts<sup>2</sup>.

'In *Story on the Conflict of Laws*<sup>3</sup>, it is said that the principle that the judgment is conclusive "is applied to all proceedings *in rem* as to moveable property within the jurisdiction of the court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign courts of Admiralty," [in causes] . . . "of which such courts have a rightful jurisdiction founded in the actual or constructive possession of the subject-matter." . . .

'We apprehend the true principle to be that indicated in the last few words quoted from *Story*. We think the enquiry is, first, whether the subject matter was so situated as to be within the

<sup>1</sup> *Schibebv v. Westenholz* (1870), L. R. 6 Q. B. 155; *Copin v. Adamson* (1875), 1 Ex. D. (C. A.) 17.

<sup>2</sup> See *Story*, s. 592, and *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 428, 429, per Blackburn J.

<sup>3</sup> Sect. 592.

lawful control of the state under the authority of which the court sits; and, [secondly, whether the sovereign authority of that state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world<sup>1</sup>.]

In other words, the admitted rule as to judgments *in rem* is a direct and obvious application of the principle of effectiveness, and the same remark applies to jurisdiction in respect of immovables, or land, situated in a given territory<sup>2</sup>. Whenever, indeed, a court is applied to, as for example in the old action of ejectment, for the purpose of obtaining from it possession of land, or a determination of the right to the ownership of land, the proceeding is, in substance, though it may not be in form, an action *in rem*.

2. *Actions with regard to divorce and status*.—Jurisdiction in regard to divorce in general depends, according to English law, upon the domicile of the married persons, one of whom seeks a dissolution of the marriage, i. e. upon the domicile of the husband. The courts of the domicile do possess, and the courts of any other country, speaking generally, do not possess, jurisdiction to grant divorce<sup>3</sup>.

No doubt there is a great deal which is artificial in the rules for determining a person's domicile. A man, and still more often a woman, may be legally held to have his or her home in a country where he or she does not live, and, it may be, has never lived. Hence there is an apparent unreality about the rule which bases a court's authority to dissolve a marriage upon the domicile of the parties. Still, in the vast majority of cases, a person's domicile is his actual home; it is the country where he lives, it is his actual home. Hence far more often than not a divorce granted by a court of a person's domicile is the most effective sentence of divorce which can be attainable. The practice, therefore, of the English courts in this matter is a distinct application of the principle of effectiveness combined with the corollary thereto. To this we must add the consideration that, in questions concerning divorce and status generally, it is of practical importance that the courts of some one country should have exclusive jurisdiction. We can

<sup>1</sup> *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 428, 429, per Blackburn J. With the second question here raised we need not concern ourselves, since the aim of this article is, as already stated, to examine the principles which determine whether the courts of a given country are or are not courts of competent jurisdiction. It is not the object of this article to determine what may be the extra-territorial effect of a judgment given by a court which has not been authorised by the sovereign in whose name it acts to give judgment in a particular matter or particular class of cases. As to this compare with *Castrique v. Imrie*, *Vanquelin v. Bouard* (1863), 15 C. B. N. S. 241.

<sup>2</sup> See Story, ss. 589-591, and *Rose v. Himely*, 4 Cranch, 269, 270.

<sup>3</sup> See Dicey, Domicil, rr. 46, 47, pp. 225-243.

therefore see why it is that, assuming the validity of the English doctrine of a man's belonging to the country where he is domiciled, the courts of the domicile, at the time when the proceedings for divorce are taken, not only have jurisdiction, but, subject to very limited exceptions, have, according to English law, exclusive jurisdiction in the matter. The same remark applies, speaking in broad terms, to all actions with regard to status. We can also see how it comes to pass that English courts treat other circumstances, such, for example, as the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the offence giving rise to divorce is committed, as immaterial in respect of jurisdiction. These circumstances have nothing to do with the effectiveness of the sentence of divorce.

3. *Actions with reference to succession.*—The courts of a deceased person's domicile are admittedly courts of competent jurisdiction to determine the devolution, whether by will or otherwise, to the movable property left by the deceased. Here again we have a clear application of the principle of effectiveness.

A person belongs, according to the view of English judges, to the country where he is domiciled: it is there that he lives, it is there, in the main, that, speaking very generally, his movable property will be found situated. If it be desirable, as would be generally admitted, that the succession to the whole of his movable estate should be determined by some one law, then that law must be the law of the country to which he belongs, i. e. where he dies domiciled. Hence the courts of a deceased's domicile should certainly be held courts of competent jurisdiction in regard to succession to movables. Whether they ought to be held to be courts of exclusive jurisdiction is a somewhat different matter, with which it will be convenient to deal in considering the objections to the doctrine that jurisdiction is based in the main on our two principles.

4. *Actions in personam.*—This is the class of actions which presents most difficulty to a student bent on ascertaining the theory of jurisdiction upheld by the High Court. One reason of this is that the court almost admittedly claims for itself a jurisdiction more extensive than it would concede to foreign tribunals<sup>1</sup>. Another reason is that the judges of the High Court can hardly be said to have propounded any one guiding principle as to jurisdiction *in personam*, or rather, as we shall shew later, the single principle which has been judicially put forward, with more or less authority<sup>2</sup>, derives its real meaning from the instances and illustrations of it. For guidance as to the jurisdiction claimed by the court itself we must look

<sup>1</sup> See *Schibsy v. Westenholz* (1870), L. R. 6 Q. B. 155, 159.

<sup>2</sup> *Ibid.*



partly to the practice (independently of statute) of the old Courts of Common Law and of Equity, partly to a list of the instances in which the jurisdiction of the High Court has received statutable extension<sup>1</sup>. For guidance as to the jurisdiction conceded to foreign tribunals by the High Court we must look to the, more or less, authoritative enumeration of the cases wherein the judgment of a foreign court is to be held *prima facie* binding, as being delivered by a court of competent jurisdiction<sup>2</sup>. This list, however, does not profess to be exhaustive, nor, except in so far as it may be confirmed by reported decisions, is it of undisputed authority. Our right course is to take the instances in which the High Court apparently exercises, or concedes, jurisdiction, and shew that many of them hold good when tested by our criteria.

The High Court exercises jurisdiction *in personam* both where the defendant is, and where the defendant is not, in England at the time of the commencement of an action.

*First. Where the defendant is in England.* The High Court, or rather the Courts of Common Law and of Equity, which for our present purpose make it up, have always claimed jurisdiction *in personam* over a defendant in virtue of the service upon him of the king's writ, and as the writ can be served upon any one in England, and cannot, except under statute, be served upon any one out of England, this has been in effect a claim to jurisdiction based on the presence of a defendant in England. But such jurisdiction, though originating in technical rules of practice, is in reality based upon the principle of effectiveness. Whenever the King of England could serve a defendant in England with the royal writ, or command, the King could, if he chose, make his judgment effective against the defendant<sup>3</sup>.

*Secondly. Where the defendant is not in England.* The Courts of Common Law and of Equity have never till recent times claimed or exercised, at any rate directly, jurisdiction over a defendant who was not in England at the time for the service of the writ. The test, therefore, of effectiveness has held good in its negative, no less than in its positive, aspect.

The Courts of Common Law and of Equity have further always exercised jurisdiction over a defendant who appeared to, or a plaintiff who brought, an action or suit. This again is in strict conformity with the principle or test of submission.

<sup>1</sup> Rules of Court, 1883, Ord. XI, r. 1.

<sup>2</sup> *Schibbey v. Westenholz* (1870), L. R. 6 Q. B. 155; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

<sup>3</sup> See as to process 3 Blackstone, Cap. XIX, pp. 279-292, and note particularly the different modes of compelling appearance.

But the High Court now, under statutable powers<sup>1</sup>, exercises jurisdiction in several cases in which the defendant is not in England, and cannot therefore be served with a writ in England. In dealing with this matter we may dismiss from consideration all actions which directly or indirectly concern land in England<sup>2</sup>; they are in reality actions *in rem*, and the jurisdiction of the court clearly stands the criterion of effectiveness. Two of the other instances in which the jurisdiction of the court is exercised are:

*Case 1.* Where relief is sought against a person *domiciled*, or *ordinarily resident*, in England<sup>3</sup>.

*Case 2.* Wherever any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be prevented or removed.

Here again there is no substantial difficulty in applying the principle of effectiveness. Case 1 is little more than an extension of the rule that a defendant who is present in England is liable to the jurisdiction of the court. A person who is domiciled or is ordinarily resident in a country is a person against whom a judgment can, if not always yet more often than not, be rendered effective. Something indeed may be said against the admission of domicile as a ground of jurisdiction *in personam*, and this point will be considered at a later part of this article. Case 2 clearly stands the criterion of effectiveness. When an injunction is applied for against something done or to be done in England the court is clearly asked to exercise precisely the powers which English courts and no others can effectively exert.

No doubt the High Court does exercise jurisdiction in cases which do not, obviously at least, come within either the principle of effectiveness or the principle of submission, and the existence of these cases<sup>4</sup> is an objection to the soundness of the doctrine propounded in this article. The force of this objection will receive consideration in its proper place. Meanwhile all that need be insisted upon is that the jurisdiction *in personam* of the High Court, in so far as it is original and independent of statute, rests almost entirely upon one or other of our two principles of jurisdiction, and, in so far as it is statutable, is to a very great extent based on the principle of effectiveness.

The High Court certainly, or all but certainly, concedes jurisdiction to the courts of a foreign country in the following cases<sup>5</sup>:

<sup>1</sup> See Rules of Court, 1883, Ord. XI, r. 1.

<sup>2</sup> Ibid. r. 1 (a), (b).

<sup>3</sup> Ibid. r. 1 (c).

<sup>4</sup> Ibid. r. 1 (e), (g); Ord. XVI, r. 48.

<sup>5</sup> *Schlösky v. Westenholz* (1870), L. R. 6 Q. B. 155; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

- i. Where the defendant is at the time of the action being brought resident (present?) in the foreign country.
- ii. Where the defendant is at the time of the judgment being delivered a subject of the sovereign of a foreign country.
- iii. Where either party has precluded himself from objecting to the jurisdiction of the foreign court.

These are the sole instances in which it is in any degree certain that our judges concede jurisdiction *in personam* to the courts of a foreign country, and some doubt may even be entertained whether jurisdiction would always be conceded solely on account of the defendant's allegiance<sup>1</sup>.

Now of these cases, i. and ii. clearly come within the principle of effectiveness, whilst iii. is nothing but the application, or rather the expression, of the principle of submission.

### III.

#### *Objections to proposed principles of jurisdiction.*

Our theory of jurisdiction is open to objections of two different kinds.

*First.* English judges, it may be urged, have maintained a different doctrine, for they have based the jurisdiction of a sovereign, when acting as judge, not on his power to enforce his judgments, but on the 'duty' of the person affected thereby (speaking generally the defendant) to obey them.

That the judges have used language which apparently supports this objection is true. 'We think,' say the Court of Queen's Bench, 'that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action'<sup>2</sup>.

The answer to this objection is that the doctrine judicially laid down does not in any way contradict the principles contended for in this article. The language of Baron Parke adopted by the Court of Queen's Bench is, when taken alone, too vague to afford a test of jurisdiction. The term 'duty' cannot be used in its ethical sense.

<sup>1</sup> *Douglas v. Forrest* (1828), 4 Bing. 686 is the only case known to me which comes near to a decision that allegiance is a basis of jurisdiction. There are of course dicta in *Schibsby v. Westenholz*, *Rousillon v. Rousillon*, and perhaps elsewhere, to the effect that the courts of a country have jurisdiction over a defendant who at the time when the judgment is given is a subject of the sovereign thereof.

<sup>2</sup> *Schibsby v. Westenholz* (1870), L. R. 6 Q.B. 155, 159, per Curiam. See *Russe v. Smyth* (1842), 9 M. & W. 819; *Williams v. Jones* (1845), 13 M. & W. 628, 633.

The moral obligation of a defendant, *X*, to obey the judgment of an Italian Court ordering him to pay £20 to *A* depends on many considerations which courts of law, not being courts of casuistry, do not attempt to touch, and, above all, on the very matter which in an action on a judgment cannot be discussed at all, namely, whether *X* does or does not, in fact, owe £20 to *A*. A 'duty' from a legal point of view is the correlative to a 'right,' and the question therefore whether *X* is under a duty to obey the judgment of an Italian Court is identical with the enquiry whether the King of Italy, acting through his courts, has a right to command *A* to pay *X* £20? That this is so is admitted by the very judgment which treats the 'duty' of the defendant as a criterion by which to determine the competence of a foreign court<sup>1</sup>. We are forced then to ask when has a given sovereign, e.g. the King of Italy, the 'right' to issue commands to *X*? This is the problem to be solved. Our criteria are an attempt to solve it. The validity of a solution cannot be affected, one way or the other, by stating the problem which the solution is intended to answer. The Court of Queen's Bench, in fact, do not really rely upon the vague principle that the validity of a foreign judgment depends on the duty of a defendant to obey it. What they really do is to enumerate the circumstances under which this duty arises, and to shew that, in the particular case, none of the conditions, which create a duty on the part of a defendant to obey, or the right on the part of a sovereign to issue, a judgment against him, exist. The important thing therefore to ascertain is whether the principle of effectiveness and the principle of submission do, or do not, include all the conditions under which, according to the judgment of the Court of Queen's Bench, a person is bound, or is under a duty to obey, the commands of a sovereign.

Here we come across another and much more serious objection to the positions which I am concerned to defend.

*Secondly.* The High Court, it may be urged, claims or concedes jurisdiction under circumstances which cannot be covered by either of our principles of jurisdiction.

The validity of this criticism can be determined only by examining the cases which, apparently at least, fall within neither the principle of effectiveness nor the principle of submission.

These apparently anomalous or exceptional cases may be brought under the following heads, to some of which reference has already been made in the foregoing pages.

I. *Jurisdiction founded upon domicil or ordinary residence.*—That a person should be bound by a judgment because he is domiciled

<sup>1</sup> *Schibbey v. Westenholz* (1870), L. R. 6 Q. B. 155, 160, 161.

in the country where the court delivering judgment has authority is, it must be admitted, to a certain degree an anomaly.

In actions having reference to status this anomaly may, as already suggested, be without great difficulty accounted for. The courts of a man's domicile can give a *more effective* judgment with regard to his status, e.g. on the question whether he is to be held legitimate or not, than the courts of any other country. That jurisdiction should therefore in this case depend upon domicile is in conformity with the principle of effectiveness and the corollary thereto.

That domicile should be the test of jurisdiction in matters of succession to movable property admits also of explanation. It is true that, if each piece of property be looked at separately, jurisdiction ought to belong not to the courts of the deceased's domicile, but to the courts of the country where each piece of property is situated at the time of his death, for it is clear that it is the courts of the *situs* which can give the most effective judgment with regard to the possession of property situated within a given territory. But if it be convenient, as it certainly is, that the courts and the law of some one country should determine the succession to the whole of a deceased's movable property, then it is in accordance with the principle of effectiveness that jurisdiction should belong to the courts of the deceased's domicile.

From the fact, however, that in matters of succession the power of giving an effective judgment belongs rather to the courts of the *situs* than to the courts of the domicile, flow some noteworthy results.

In the first place succession to land is determined by the courts of the country where the land is situated<sup>1</sup>.

In the second place, in countries such as England, where a distinct difference is drawn between the administration of, and the beneficial succession to, movables, every matter connected with administration is within the jurisdiction of the courts of the country where any articles of a deceased's movable property are situated. *T*, an intestate, for example, dies domiciled in Portugal, leaving goods, money, &c., in England. The Portuguese courts indeed are courts of competent jurisdiction, whether *A*, *T*'s natural son, is or is not entitled to succeed to such part of *T*'s money and goods as may remain after the due administration of *T*'s property in England, e.g. the payment of his debts there, and the decision of the Portuguese courts in the matter of *A*'s claim to succeed will be taken as conclusive by English courts<sup>2</sup>. But it is to the English courts, or to persons acting under their authority, that belongs the right and

<sup>1</sup> Story, s. 591.

<sup>2</sup> *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

duty of administration. They are in this matter the courts of competent<sup>1</sup> jurisdiction.

In the third place, though, as regards beneficial succession to movables, the courts of the deceased's domicile are courts of *competent* jurisdiction, they are not courts of *exclusively competent* jurisdiction. Thus, though to follow out our supposed case of a Portuguese dying domiciled in Portugal, and leaving movables in England, the Portuguese courts are competent to determine whether *A* has a right to succeed beneficially to *T*, yet the right and duty of the English court in 'administering the property, supposing a suit to be instituted for its administration, is to ascertain who, by the law of the domicile, are entitled' [to succeed to *T*'s property] 'and, that being ascertained, to distribute the property accordingly. The duty of administration is to be discharged by the courts of this country, though in the performance of that duty they will be guided by the law of the domicile<sup>2</sup>; and will follow any decision given in the matter, e.g. as to the right of an illegitimate son to succeed, by the courts of the domicile<sup>3</sup>. The admitted rules, in short, as to jurisdiction in matters of succession, arise not from any opposition to the principle of effectiveness, but from a question how best to apply it to the matter in hand. Look at the property of a deceased as a whole, and the courts of the country to which he belongs, i.e. according to English law, of his domicile, will appear to be in general the tribunals most capable of giving an effective judgment with regard to it. Look, however, at his movable property, not as a whole, but as consisting of separate movables, and then it will appear that the courts of a country where each movable is situated, and *a fortiori* of every immovable, is the tribunal capable of giving the most effective judgment with regard to such movable. Whatever be the most proper application of the principle of effectiveness, the very difficulties felt by the courts in applying it shew that it is the principle by which they are guided in matters of succession.

Why, however, should domicile be a foundation of jurisdiction in personal actions?

The answer apparently is that, until recently, it never has been, according to English law, a ground for jurisdiction. That it has recently been treated as such must be attributed, either to the habit of resting jurisdiction on domicile in matters of status and of succession, or to the fact that, when a man is 'domiciled' or 'ordinarily resident' in a country, the courts of that country can, if not always,

<sup>1</sup> Compare *Enohin v. Wylie* (1862), 10 H. L. C. 1, with *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34; (1885), 10 App. Cas. 453.

<sup>2</sup> *Enohin v. Wylie* (1862), 10 H. L. C. 13, per Lord Cranworth, cited with approval in *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453, 503, per Lord Selborne.

<sup>3</sup> *Dogtioni v. Crispin* (1866), L. R. 1 H. L. 301.

yet frequently, make a judgment against him effective, with which fact is combined the consideration that a man who has his domicile or ordinary residence, e.g. in England, may perhaps be taken to submit to the jurisdiction of the English courts. However this may be, the admission ought to be made that, as regards actions *in personam*, it is something of an anomaly that domicile should be made a ground of jurisdiction.

2. *Jurisdiction founded on place of obligation.*—It is sometimes asserted that the High Court recognises the jurisdiction of the *forum obligationis*, that is of the courts of the country where an obligation is incurred or, in terms of English law, a cause of action arises<sup>1</sup>. For this assertion, however, if made in its full breadth, nothing like decisive authority can be cited. Neither at Common Law nor in Equity did the mere fact of a contract having been made or broken, or of a tort having been committed, in England, give the courts jurisdiction over a defendant not present in England, and there is no reason to suppose that the English courts conceded to foreign tribunals authority more extensive than that which the English courts claim for themselves. At the present moment, moreover, there is nothing to shew that the commission of a tort whether in England or in a foreign country is held by our judges to give jurisdiction in respect of the wrong to the courts of the country where the wrong is committed.

The Common Law Procedure Act, 1852, ss. 18, 19, gave the Common Law Courts jurisdiction (which the judges themselves thought in principle hardly defensible<sup>2</sup>) over a defendant not present in England when either the cause of action arose in England or depended upon the breach of a contract made in England<sup>3</sup>, and at the present moment the High Court claims jurisdiction *in personam* over an absent defendant when the action is founded on a breach in England of any contract wherever made which according to the terms thereof ought to be performed in England<sup>4</sup>. Whether the High Court would concede an analogous jurisdiction to foreign tribunals is a point on which no certain opinion can be pronounced, whilst authority can be cited<sup>5</sup> for the proposition that the mere circumstance of a contract having been made in a foreign country does not give jurisdiction to the courts thereof. Assume, however, that the High Court holds that foreign courts can exercise all jurisdiction which it claims for itself, and even then the respect

<sup>1</sup> See *Schibsey v. Westenholz* (1870), L. R. 6 Q. B. 155, 161, compared with Westlake (3rd ed.), pp. 345, 346, and Rules of Court, 1883, Ord. XI, r. 1 (e).

<sup>2</sup> *Schibsey v. Westenholz* (1870), L. R. 6 Q. B. 155.

<sup>3</sup> C. L. P. Act, 1852, s. 18, and see *Jackson v. Spittall* (1870), L. R. 5 C. P. 542; *Durham v. Spence* (1870), L. R. 6 Ex. 46; *Althusen v. Malgaraja* (1868), L. R. 3 Q. B. 340.

<sup>4</sup> Rules of Court, Ord. XI, r. 1 (e).

<sup>5</sup> *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

paid by our judges to the *forum obligationis* is reduced to this, namely, that the courts of a country have, in the opinion of the High Court, jurisdiction over a defendant who has broken in that country a contract which by the terms thereof ought to be performed there.

Even this amount of respect for the *forum obligationis* cannot, it will be said, be explained in any way by the principle of effectiveness. This is true; but the jurisdiction of the courts of a country where a contract is intended to be performed and is in fact broken may be explained as an extension or application of the principle of submission. If *X* contracts with *A* to do something, e.g. build a house or deliver goods in France, there is, at any rate, some ground for the assumption that *X* and *A* tacitly agree to submit any controversy as to the performance of the contract by *X* to the decision of the French courts. If this explanation be thought far-fetched, then the deference, limited as it is, paid to the *forum obligationis* must be treated as an anomaly suggested to English judges when framing rules as to jurisdiction<sup>1</sup> by the provisions of the Common Law Procedure Act, 1852, ss. 18, 19.

3. *Possession of property*.—Ought the possession of immovable or movable property in a particular country to give the courts thereof jurisdiction over the possessor? This is a question which in the opinion of English judges is still open to discussion.

Two points, however, must be carefully distinguished.

The possession of property, whether land or goods, undoubtedly gives the courts of the country where the property is situated jurisdiction over that property and, therefore, over the owner or possessor thereof, in regard thereto. If a man claims land or goods in Italy the Italian courts have a right to determine who is the person entitled to the ownership, or possession, of such land or goods. Such a determination is in substance though not necessarily in form, a judgment *in rem*, and its effect is, subject to exceptions with which we need not now trouble ourselves, fully recognised by English courts<sup>2</sup>. One may perhaps even go a little further and say that the possession of property, at any rate of land, in a country gives the courts jurisdiction over the possessor in regard to obligations connected with the property<sup>3</sup>. This concession of jurisdiction is not only consistent with, but confirmatory of, both the principle of effectiveness and the principle of submission.

<sup>1</sup> Rules of Court, 1883, Ord. XI, r. 1.

<sup>2</sup> See *Castrique v. Imrie* (1870), 39 L. J. C. P. 350; *Schidaby v. Westenholz* (1870), L. R. 6 Q. B. 155, 163; *Alcock v. Smith* (1891), 7 Times L. R. 750; *Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L. J. Ex. 350; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

<sup>3</sup> *Ibid.* and *Becquet v. McCarthy* (1831), 2 B. & Ad. 951, and compare Rules of Court, 1883, Ord. XI, r. 1 (a), (b).



The possession of property, whether land or movables, is however in some countries, and notably in Scotland, held to give the courts of the country jurisdiction over the possessor, not only in respect of the property or duties conceded with it, but generally, and in short to have the same effect as is given to the presence of the owner in Scotland. This is apparently the theory of (so called) arrestment to found jurisdiction<sup>1</sup>; if, for example, *X* has broken a contract with *A*, or done a wrong to *A*, and goods of *X*'s are lying in Scotland, the arrest of the goods gives the Scotch courts, according to Scotch law, jurisdiction to entertain an action against *X* for the breach of contract or the wrong<sup>2</sup>. The High Court, however, does not claim jurisdiction for itself on account of the presence in England of a defendant's property, and English judges have expressed the greatest doubt whether the possession of property locally situated in a country and protected by its laws does afford a ground of jurisdiction, and incline to the opinion that it does not.

Now the noticeable thing is the existence of this doubt and the reason thereof. The argument for basing jurisdiction on the possession of property is that the possession by *X* of property, e.g. in Scotland, especially when seized by the Scotch courts, does, as far as it goes, give the courts the means of rendering a judgment against *X* effective. The argument against making the possession of property a ground of jurisdiction is that 'the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment'<sup>3</sup> given against him by the foreign court in an action, e.g. for libel, which has no reference to his rights over such property. In other words, the objection to jurisdiction founded on the possession of property, say in Scotland, is that the fact of *X*'s possessing property in Scotland does not of itself give the Scotch courts power to deliver an effective judgment against *X*. Whatever be the weight of the arguments in favour of, and against, the founding of jurisdiction on the possession of property, the hesitation of English judges in the matter is instructive. They hesitate because there is a difficulty in determining how far jurisdiction resting on the possession of property stands the test of effectiveness.

4. *Convenience*.—The High Court assumes jurisdiction in certain instances on the ground of convenience, and especially upon the ground of the advantage of pronouncing judgment once for all against every person interested in a particular action. Thus a person *Y*, living out of England, may be joined as defendant in an action

<sup>1</sup> Mackay, *Pract. Court of Session*, vol. 1, pp. 173-176.

<sup>2</sup> See especially Mackay, i. p. 177, note (a).

<sup>3</sup> *Schibuby v. Westenholz* (1870), L. R. 6 Q. B. 155, 163.

against X, because he is a proper party to the action<sup>1</sup>, and on similar grounds a defendant may join in the action a third party, against whom he is entitled to indemnity even though such third party be out of England. The exercise of jurisdiction in these instances cannot fairly be brought under the principle either of effectiveness or of submission; it is, strictly speaking, anomalous and justifiable if at all, only by considerations of immediate convenience. Our courts would scarcely admit the validity of foreign judgments against persons made parties to an action under rules similar to Rules of Court, 1883, Order XI, r. 1 (g), or Order XVI, r. 48.

Our examination then of the principles, or criteria, of jurisdiction leads to this result. The greater number of the instances in which the High Court itself claims jurisdiction, or allows jurisdiction to foreign courts, fall under one or other of our two principles. The instances which do not at first sight fall under one of these principles are some of them seen to be in reality to be applications of one or other of these principles, modified more or less by the desirability (e.g. in the case of divorce) of enabling the court of some one country to give a final decision on matters as to which the court of no country can give an absolutely effective judgment. In other instances the rule as to jurisdiction is doubtful, but in these the doubt is found, on investigation, to arise not from the invalidity of our tests but from a difference of opinion on the result to which the application of these tests leads. There are further one or two cases in which our courts for purposes of convenience exercise a jurisdiction, which they would not concede to foreign tribunals. If, however, the instances in which our tests obviously hold good be fairly compared with the few instances in which their validity is disputable, the conclusion to which we are led is that the principle of effectiveness and the principle of submission are the true, though not perhaps the sole, criteria of jurisdiction.

A. V. DICEY.

<sup>1</sup> Ord. XI, r. 1 (g).

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## THE EARLY HISTORY OF THE INCORPORATED LAW SOCIETY<sup>1</sup>.

**I**T is curious how little has been known of the early history of the Law Society. It has always been assumed that the Society with its affiliated Law Society Club originated no further back than 1823-1825. A little consideration, however, suggests that the Society was far too strongly supported in 1823 to be then altogether a new thing, and that there must have been some earlier existing body on which the new Society was founded.

The first hint of this appears in a pamphlet issued in 1883 by Mr. W. O. Hewlett, Secretary of the Law Society Club, 'on the origin of the Club and its connection with the Incorporated Law Society.' In this it is stated that for some years before any attempt was made to form the Institution known as the Incorporated Law Society, a Club consisting of Members of the legal profession and known as the Verulam Club existed in Lincoln's Inn Fields, which on the formation of the Law Institution became the nucleus of it and largely contributed to its success. Reference is then made to the first volume of Annual Reports and Proceedings of the Incorporated Law Society, commencing with a prospectus issued to the profession relative to the foundation of a Law Institution in or near Chancery Lane, London, dated 25th September, 1823, which prospectus as well as similar prospectuses, dated 23rd January, 1824, and 23rd January, 1825, enumerated the advantages likely to accrue from such an Institution.

The movement then set on foot, whatever may have been its origin or past history, resulted in a Deed of Settlement of 1827, followed by the first Charter of Incorporation in 1831.

In the early editions of the Society's Calendar it was stated that the project of a 'Law Institution' could not be traced back to an earlier date than the year 1825, and that prior to that period solicitors were without any sort of organisation designed for the purpose of protecting their honour and their just interests, and of representing their views on legal subjects, whether of a professional or general character. This statement was probably founded on a misapprehension of the prospectuses above referred to, and in the supplement to the present calendar it is corrected.

<sup>1</sup> This article is the substance of a paper read by the author at the Annual Provincial Meeting of the Incorporated Law Society, held at Plymouth in August last.

Nothing more was however known until about a year ago, when the Secretary of the Society, Mr. Williamson, discovered in the Society's muniment room a box which proved on examination to contain a number of books and papers, of which I will endeavour to give some account.

These documents enable us to trace back the history of the Institution nearly a hundred years prior to the date assigned in the calendar—or, more exactly, to the year 1739. They consist of six small Minute Books kept by the Secretaries, extending over the period from 13th February, 1739, to 19th June, 1761; drafts of these and subsequent Minute Books now missing, lists of names of persons taking dinner tickets, two or three plans of dinner tables, lists of provisions and wines, accounts of moneys received and expended, and bundles of letters and miscellaneous papers.

The Society of which these Minute Books give us so graphic an account was called 'The Society of Gentlemen Practisers in the Courts of Law and Equity.' When it was formed we have no record of, but the first minute in 1739 seems to imply that the Society had been previously in existence.

The meetings were held in the neighbourhood of the present hall, generally at the 'Crown and Anchor' Tavern in the Strand, or at the 'Old Devil' Tavern, Temple Bar, subsequently at the Hall Clement's Inn, by permission of the Principal and Rules, and later at the Freemasons' Tavern.

The usual place was the 'Old Devil' Tavern, now no more, but formerly opposite to the 'Cock' Tavern, and within two doors of Temple Bar, a place of resort mentioned by Ben Jonson and frequented by lawyers, who wrote up on their chamber doors, 'Gone to the Devil.'

The general meetings, as they were termed, were held twice a year, usually in February and the end of June or early in July, and commenced with a dinner at two. How long these dinners lasted we are not told, but by a happy accident the plan of the dinner on the 21st July, 1775, has been preserved, and we have dishes of 'chumps of beef, pasty's, fruit pies,' &c. located, and on the same occasion we have the wine bill—certainly not an extravagant one. The dinner over, it would appear that the business commenced, interspersed with, or alternating with, toasts somewhat as follows:—'The King, Queen, and Family;' Orders made for contributions; 'The Lord High Chancellor;' Committee's report on accounts; 'The Lord Chief Justice and Judges of the King's Bench;' the minutes of the last meeting and Committee's reports; 'The Master of the Rolls;' Stewards appointed; 'The Lord Chief Justice and Judges of the

Common Pleas;' general business mingled with the toasts of 'Our Law and Liberties;' 'Trade and Navigation;' 'The Prolocutor's Health;' 'The Stewards;' 'Stewards Elect and New Members.'

It was also ordered that no new business was to be taken after seven. No doubt by this time the members were in need of relaxation, and we need not enquire too curiously how they spent the rest of the evening.

The admirable nature of the business done will be seen presently. The members themselves seem to have been exclusively town 'practisers,' and country practitioners are treated as ineligible.

The number seems to have been from eighty to one hundred, and in the lists appended to the minutes one cannot help being struck by familiar legal names, showing how hereditary the profession has been; and no doubt with the aid of these books, the Petty Bag records, and old Law Lists, the pedigrees of many eminent firms might easily be traced.

The work itself was mainly done by a 'Committee' corresponding closely to the present Council, elected by the members, whilst the Chairman, corresponding to the President, was termed 'Prolocutor.' The Committee met as often as required and prepared reports, memorials, &c., which were laid before the general meetings.

The following are some of the actual doings of the Society:—

The first meeting recorded was held on the 13th February, 1739, when 'the meeting unanimously declared its utmost abhorrence of all male and unfair practice, and that it would do its utmost to detect and discountenance the same, and to that end it was agreed that a general meeting be had twice a year, and that twenty-one members should be appointed to meet once a month, or oftener if thought proper, to consider of such methods as might best answer the purposes aforesaid, who were to report the same and their opinion thereon at the next general meeting, and that any five of them should be a sufficient committee.'

Then follow the names of the Committee and the Stewards for the next meeting.

The next meeting was held in the following July, when the thanks of the Society were given to Mr. Perkins for his services done to the practisers in the several Courts of Law and Equity, and the Committee was continued.

The Committee then proceeded to consider a Bill for regulating trials at Nisi Prius, and for the more effective summoning of juries, and a deputation was appointed to attend the gentlemen in the House of Commons who had the Bill under their consideration, and to give them their assistance in settling it.

In June, 1741 (150 years ago), was established the real charter

of the Society, when, to the lasting honour of its founders, they laid it down that the Committee was to 'take into consideration any matters relating to the benefit of suitors and the honour of the profession'—a definition of the province of the Society upon which it will not easily improve.

A few months after, the Committee actually take into consideration alleged irregularities of a Practiser.

At the next general meeting in February, 1742, a resolution was passed that an application be made to leave out of the next Land Tax Act so much of it as incapacitated attorneys and solicitors from being commissioners for executing the said Act, and members were to use their utmost endeavours to this end, and the Committee were to draw up reasons.

This was done, and members interviewed the Speaker, the Lord Mayor, and others in furtherance of the object.

The meeting of the Committee in July, 1742, was even more memorable, for their assistance was desired by a member of the House of Commons 'for the preparing heads of a Bill for the more easy recovery of small debts,' and the Committee were unanimously of opinion that if such a Bill were properly framed, it would be of public utility, and they resolved to give their utmost assistance for promoting it. The Committee accordingly drafted a Bill and gave to it much consideration, but it is not stated what became of the Bill.

Present members may feel a legitimate pride in knowing that nearly a hundred years before Lord Brougham's attempt to establish County Courts their Society was engaged in promoting a Bill of so much service to the general community, and that if it did not then become law it was no fault of their profession. This may be fairly taken as the starting-point of organized efforts made by the profession to promote reforms in the interests of the general public; efforts which have been continued for just upon 150 years, however little such efforts may be known to or appreciated by those who ignorantly think that useful reforms are opposed by the lawyers.

We next find the Society engaged, and successfully too, in resisting a dangerous invasion on their privileges, for the 'Clerks in Court' (i. e. the assistants of the Six Clerks in Chancery) endeavoured to be admitted as solicitors and to take articulated clerks. Deputations were sent to the Master of the Rolls, and counsel briefed, and ultimately the Clerks in Court were beaten.

Probably some of the dramatists and novelists of the period would have been surprised to learn that the old Society was so fastidious as to object to practitioners who had stood in the pillory or been

concerned in highway robberies, and even to suggest that they should be struck off the Rolls.

In 1748 an irregular retainer accepted by counsel in an underwriting case engaged the attention of the Society. The retainer was expunged from his fee-book and an apology tendered and accepted.

Passing over some unavailing regrets at the increasing numbers of the profession, we next come to a serious piece of litigation in which the Society embarked against the Scriveners' Company. That Company had instigated a prosecution against a solicitor practising in the City of London, on the ground that he was acting as a scrivener in the City, not being free thereof nor of the Company.

The Society clearly saw that the existence of the profession in the City was at stake, and undertook the defence. A formidable array of counsel was engaged, and for a period of eleven years the fight lasted, going through various stages, and ultimately the case was won for the Society. The triumph was duly celebrated, and pieces of plate given to the surviving counsel, with suitable inscriptions recorded in the minutes<sup>1</sup>.

In July, 1751, I find a 'paper' was read.

We pass on to 1766, when a learned serjeant addressing a jury made some uncalled for remarks on the ignorance of attorneys, and the Society resolved that any counsel making such reflections in general ought not to be employed. This was followed by a humble letter of apology, which was duly accepted.

In 1770 is found entry of 'The Secretary's Bill of Craveings,' and his cravings being apparently unsatisfied he presents a larger 'Bill of Craveings' a few months after.

From about this time the short title 'Law Society' is occasionally used, though the proper title remains as before—'The Society of Practisers,' &c.

In 1783 the subject of delays and expenses in Chancery engaged the attention of the Society, and a gentleman named Vernon prepared a plan for remedying these inconveniences. The Committee consulted several gentlemen at the Bar and practisers thereon, but the plan not having been fully digested the further consideration of the matter was adjourned. Much trouble seems to have been taken, but the subject remained tough and indigestible, and unhappily the plan has not survived.

A special meeting was held in May, 1798, for considering the increasing of fees to attorneys and solicitors, and memorials were

<sup>1</sup> More information on this litigation may be found in a book in the Society's library, called 'The Case of the Free Scriveners of the City of London,' printed in 1749.

prepared, from which it appeared that such fees were founded on immemorial custom and usage only, established upwards of a century before, when the value of money was such as rendered the allowance adequate to its purpose, but that the personal and particular imposts laid on the practisers within the last few years, and other causes which occasioned a decrease of their capital, rendered an increase of their fees absolutely necessary. Memorials were accordingly prepared and presented to the Lord Chancellor and Master of the Rolls, and the Prolocutor took much trouble in the matter and had an interview with Lord Chancellor Loughborough, in which the Prolocutor pointed out that a certain book of orders in Lord Hardwicke's time, in 1741, referred only to the fees of officers of the Court of Chancery, and not to the fees of solicitors, which were fees of right by ancient immemorial custom of Common Law, and that the Chancellor had the right of control over solicitors and their fees; but nothing could be done before the Chancellor resigned. After much trouble and many interviews with the judges in 1806, a Bill was prepared to enable the Lord Chancellor, the Lord Keeper, the Lords Commissioners of the Great Seal, together with the Master of the Rolls, to regulate the fees of the sworn clerks and solicitors of the Court of Chancery, to be presented to Parliament by the Master of the Rolls, who promised to move for leave to bring it in directly. Apparently, however, this Bill was not proceeded with, for in February, 1807, we find an Order of the Court of Chancery passed and entered, and ordered to be printed and circulated, and an address of thanks was voted to Lord Chancellor Erskine and the Master of the Rolls, and it was resolved that 'Lord Erskine' be a standing toast at the Society's dinners.

The Order itself, dated February 26, 1807, is printed in Sanders' Chancery Orders, and a perusal of it shows clearly enough that it was obtained in manner above mentioned, and the conveyancing fees then settled remained unaltered till the Remuneration Order of 1882.

The fees in the Common Law Courts still required revision, and much trouble was taken, but the Society considered the new scale which was ultimately made in 1810 inadequate, and accordingly we find no mention of making Lord Chief Justice Ellenborough a standing toast.

Pending this long scale business, the Society passed a resolution condemning the practice of certain barristers, counsel, and draftsmen who received clients and transacted their business independently and without the intervention of any attorney or solicitor, as highly improper and to be discountenanced by the Society and the profession at large.



A grant of twenty guineas was made in 1801 to the Secretary for completing an index to the proceedings of the Society. It is much to be desired that this index should be found.

The general meeting of July, 1803, deals with a matter with which we have since happily had no concern, namely, a plan for the formation of a corps to be called 'The Law Association,' to serve at their own expense in case of an invasion of this country by the enemy; and the Society resolved that every exertion in their power should be most cheerfully made to second the wishes of the Law Association and to render them effective.

In June, 1807, the Committee take into consideration the formation of a Society of Articled Clerks for the discussion of legal subjects, but it is not clear whether a Society was then formed or not.

In April, 1808, the Committee met to consider a Bill pending in Parliament authorising attorneys to act as notaries.

In June, 1808, the Society decide to discontinue the use of 'spruce beer, soda water, cider, and perry' at their dinners.

In February, 1809, the Committee found themselves in a position to purchase £600 Consols, which cost, we are informed, £408, and the Secretary was ordered to make an alphabetical list of members, which has not, unfortunately, been found.

From November, 1809, onwards we find much trouble taken by the Society and its Committee, and especially by the Prolocutor and Mr. Joseph Kaye, in resisting a serious attack on the interests of the profession by a proposed resolution of the House of Commons, that some of the clerks attending the House should be employed by parties having business before the House as a Party agent or solicitor, or, as we should now say, parliamentary agent, but we have not space to detail the vigorous efforts which resulted in the establishment of satisfactory regulations.

The last general meeting actually recorded was held at the Freemasons' Tavern on the 2nd March, 1810, when it is stated that the Society was possessed of £1000 Consols; and as the very last entry makes provision for dinner for 120 gentlemen at 7s. 6d. each, exclusive of venison, and 2s. each for dessert, we may fairly conclude that the Society was then in a satisfactory and even flourishing condition.

I hope I have now cited instances enough to show that in the records of this old Society we have a most interesting account of a body of men, holding honourable positions, united for the honour and welfare of their profession, organised to an extent that few of us would have credited on less convincing evidence, and carrying out their aims with a directness and ability that leaves little room for improvement on their methods, but which at the same time will

encourage the Society to remain worthy of the great traditions handed down to it.

Those interested in the Society will be glad to hear that the Council has determined to publish the Minute Books with an appendix, giving a full account of the Scriveners' case, and other useful and interesting papers. The publication will be edited by Dr. Edwin Freshfield, a member of the Council of the Society.

Something yet remains to be done to complete this history, namely, to bridge over the gap from 1810, when these old Minute Books cease, to 1825, and, seeing how complete was the organisation up to 1810, and again from 1825 onwards, it is hard to believe that this organisation lapsed in the comparatively short intervening period of 15 years. On turning to the Prospectus of 1825, the Deed of Settlement of 1827, and the first Charter of 1831, we do not find any allegation of want of organisation, but of want of an 'establishment,' by which, it is plain, was meant a 'suitable public building.' From this and from the identity of several names in the old Minute Books and in the Prospectus of 1825, we must infer that the old organisation did in fact continue to the later date, and we may at least hope that further search and well-directed enquiries will not fail to establish this.

There is already some confirmation, in the existence of a piece of plate in the possession of Mr. Kaye, Master of the Queen's Bench Division, presented to his father, Mr. Joseph Kaye, and stated in the inscription to have been presented in 1816 by the unanimous vote of the Law Society to Joseph Kaye, Esq., their Prolocutor.

V. I. CHAMBERLAIN.

*Note.*—In the Library Catalogue of the Society, just published, it is stated that the Library originated in 1828 on gifts from Mr. Metcalfe and Mr. Bryan Holme. It may be of interest to add that there is in the Library a printed Parliamentary Return of Attorneys and Solicitors in 1729–1730, formerly belonging to Mr. Whishaw, the Secretary of the old Society, and many years prior to the first Law List published in 1775. The Society has also just obtained a transcript of a list of Attorneys in the Common Pleas from 1656 to 1729 (when the Rolls begin), the original of which is preserved in the Public Record Office.

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## THE DECLARATION OF FUTURE RIGHTS.

**T**HE heading of this article has been adopted in spite of its inaccurate application to part of the contents, in consequence of the phrase being one of constant use in the Courts and well understood by legal practitioners, whether used in its accurate meaning or not. Its inaccurate meaning is indeed the most important, and applies to cases in which the present insufficiency of the jurisdiction of our Courts is most clearly and hurtfully apparent. For instance, the vested rights of remaindermen who are all in existence will not in general be declared by the Court during the lifetime of the life-tenant, and yet it seems absurd to talk of these rights as being future. That they cannot be enjoyed in possession until the death of the life-tenant is true enough, but they are present rights in the position of a *debitum in præsenti volendum in futuro*.

The Scotch Courts are wiser and, according to the authorities cited below, are ready to declare any future or contingent rights provided there be in existence a 'competent contradictor.' There does not seem to arise in practice any inconvenience from such declarations, and certainly, if any inconvenience were possible, it would not be difficult to provide a remedy in ways that are already known.

The want of jurisdiction in England is productive of much hardship in locking up rights of property which would be in many cases of great value, if only they were ascertained by judicial decision, but which are comparatively worthless to a remainderman until the death of the life-tenant, in consequence of his inability to offer an unimpeachable title. Then again, when the life-tenant dies there must frequently be considerable delay in obtaining a decision of such a nature that a purchaser would accept, as a final judgment or order is appealable within a year to the Court of Appeal, and thence again within a year to the House of Lords; by which we may compute that three years is not an excessive allowance to make for the duration of an action to decide a case (say) of disputed construction.

The only remedies which an expectant remainderman has at present are confined to an action for the conservation of the property claimed and to an action to perpetuate testimony, both designed to protect his interests, of whatever nature they may be, until the

time when they may be adjudicated upon: but neither affording any immediate relief, except, in a few cases, incidentally.

Daniell states that it is the practice of the Court 'not to declare rights which are not immediately to be acted upon, lest events should occur, before the time of acting upon them, which may create an alteration in those rights' (Ch. Pr., Fifth Ed., p. 857), and this although all possible claimants are before the Court.

Sir George Jessel M.R., in *Hampton v. Holman* (1877), 5 Ch. D. 183, said, 'It is not the province of the Court to declare the rights of parties except in cases where immediate relief can be given:' a proposition that must be limited by the exception stated in *Gosling v. Gosling* (infra), 'unless it shall be necessary to do so for the administration of an estate.'

The case that is usually referred to as the leading authority on the subject is that of *Lady Langdale v. Briggs* (1856), 8 D. M. & G. 391, where Lord Justice Turner, differing apparently from the opinion of Lord Justice Knight Bruce, said, 'I have always considered it to be settled that the Court does not declare future rights, but leaves them to be determined when they may come into possession. In all cases within my experience where there have been tenancies for life with remainders over, the course has been to provide for the interests of the tenants for life, reserving liberty to apply upon their deaths' (p. 419). Again, at p. 427, 'I think the question deeply affects the law of the Court. This Court entertains bills to perpetuate testimony, upon the ground that the future right cannot be determined. If the Court has authority to declare future rights, upon what ground, in the case of equitable estates, are such bills hereafter to be maintained?' In this case a testator had by will given copyholds and leaseholds to trustees upon trusts to correspond with the uses of devised freeholds. By a subsequent codicil he altered the limitations of the freeholds, leaving the first tenancy for life as it was. The Court of Appeal refused to declare the rights of the reversioner who claimed the leaseholds and copyholds under the limitations in the will as between him and those who claimed the same property under the limitations contained in the codicil, and this although the copyholds and freeholds were intermixed and there were mortgages overriding both such estates.

The case chiefly relied upon was *Wright v. Atkyns* (1810), 17 Vesey 255, where a testator devised and bequeathed all his real estate unto his mother and her heirs 'in the fullest confidence that after her decease she would devise the property to his family.' A bill was filed by the heir-at-law, who was also legal personal representative of a mortgagee against the mother with the intention (in effect) of obtaining a decision as to whether she was entitled in fee simple or

was tenant for life bound by a precatory trust in favour of the plaintiff. Sir William Grant held in favour of the latter alternative and so declared. This was affirmed by Lord Eldon in the Court of Appeal (1815), 19 Vesey 299. Cooper 111: and 1 V. & B. 313, the mother was restrained from cutting timber pending the appeal. These orders were both appealed to the House of Lords, and so far as they affected future rights, were reversed (as stated in *Lady Langdale v. Briggs*, 8 D. M. & G. p. 422) with the effect of leaving these rights open.

In *Gosling v. Gosling* (1859), Johnson 265, the Court refused to decide a question raised by special case as to whether a clause in a codicil postponing the period of enjoyment of the settled estates by persons entitled in remainder, until they should attain the age of 25, was valid: Vice-Chancellor Sir W. Page Wood saying, 'The rule is now well settled, that the Court has no power, either under Sir George Turner's Act<sup>1</sup>, or under the Chancery Amendment Act<sup>2</sup>, to make a declaration, in the lifetime of the tenant for life, with regard to the interests of parties entitled in reversion, unless it shall be necessary to do so for the administration of an estate, or in order to grant the plaintiff the relief to which he is entitled; neither of which circumstances exists here.' It is to be observed that in this case there was no person in existence who was interested in maintaining the validity of the gifts: though this fact was not mentioned in the judgment. See too *Kevan v. Crawford* (1877), 6 Ch. D. at p. 42; *Dowling v. Dowling* (1866), L. R. 1 Ch. 612.

In *Walmsley v. Foxhall* (1863), 1 D. J. & S. 451, leave was given to appeal from a decree declaring future rights, although more than five years had elapsed from the date thereof, so as to enable the Court to reconsider the order as to certain of the rights which had become in the meantime immediate.

The desirability which exists in many cases that future rights should be determined, has led to many expedients being adopted by which a present decision has been obtained in an indirect way. Thus, in the case of *Bell v. Cade* (1861), 2 J. & H. 122, the question was raised by an amended special case which asked whether the plaintiff took 'a vested interest in remainder, so as to entitle him to file a bill for the purpose of having the fund secured for his benefit.' The fund was given to A, who was still living, for life, remainder to the plaintiff on attaining 24. The Court, having all necessary parties before it, decided that the gift in remainder was not void for remoteness and that the plaintiff took a vested interest, and therefore was entitled to file the bill in question. It is to be noted that here the plaintiff was entitled to the interest declared or

<sup>1</sup> 13 & 14 Vict. c. 35.

<sup>2</sup> 15 & 16 Vict. c. 86.

to nothing at all : and in the latter case he could not have filed his bill. If he had been certainly entitled to an interest, however small, remote, or contingent, he could have filed his bill to secure the fund, but could not have obtained a decision on special case as to the amount of his interest until the death of the tenant for life. Again in *Forsbrook v. Forsbrook* (1867), L. R. 3 Ch. 93, the question whether the first takers of the real estate of a testator took estates tail or for their lives was decided by the insertion of a question in a special case as to whether they were entitled to commit waste or not.

But in *Bright v. Tyndall* (1876), 4 Ch. D. 189, Vice-Chancellor Sir Richard Malins refused to decide the question whether daughters (not in esse) of the tenants for life would lose their interest in the settled estates in certain events which might or might not happen, on the grounds, 1st, that although the plaintiff had a remote contingent interest by assignment, such assignment, being made only for the purpose of the special case, should be treated as not existing, and 2nd, that an adverse decision would prejudice the daughters by taking away from them the power of compromising a doubtful point. The questions raised were whether the plaintiff had such an interest as entitled him to petition for the appointment of new trustees or to file a bill for having the estate administered and secured for his benefit. So in *Pennell v. The Earl of Dysart* (1859), 27 Beav. 542, the Master of the Rolls refused to order production of title deeds by the tenant for life at the suit of the assignee of the remainderman, as such an order could only be made on the ground that the assignee was entitled to the estate and interest claimed : and that point, which was extremely doubtful, his Lordship (Sir John Romilly) refused to decide incidentally, as such decision would not bind a purchaser from either of the claimants, and the application for the decision was premature. All the interested parties were before the Court.

In *Pryse v. Pryse* (1872), L. R. 15 Eq. 86, Sir John Wickens V.C. said that the decision in *Forsbrook v. Forsbrook* was contrary to the common opinion and the intention with which the Special Case Act was framed, 'It can hardly be right for that Court to twist the Act into an instrument for claiming a more extended jurisdiction or diverting to itself the jurisdiction properly belonging to another. Still the authorities seem to show that within certain limits the Court may be ingenious in seeking grounds to give itself jurisdiction under this particular Act, where the principal question is one which it cannot directly deal with.' In this case, however, jurisdiction was denied, as the questions raised were clearly fictitious, and invented to enable the Court to decide a

question of legal title, which was then only proper for the Courts of Common Law. See *De Windt v. De Windt* (1866), 1 H. L. 87. *Forsbrook v. Forsbrook* was again commented on by Sir George Jessel M.R., though not with absolute disapproval, in *Hampton v. Holman* (1877), 5 Ch. D. 183, but the two cases were not exactly on all fours, since it would have been impossible in the latter to obtain a decision on the main point by claiming a declaration as to a subsidiary issue.

The opinions of the judges seem unanimous that some change in the direction of extending the jurisdiction is necessary. Thus Lord Justice Turner in *Lady Langdale v. Briggs*, 8 D. M. & G., said at p. 427, 'I am far from thinking that, to some extent at least, the legislature might not usefully interpose, and provide some remedy for the ascertainment of future rights. . . . This subject was much pressed upon my attention when the Special Case Act was framed. Lord Cottenham was desirous that the act should be extended, so as fully to introduce into our law the Scotch declarator, but it was ultimately thought more prudent in the first instance, both by him and by me, to limit the remedy, leaving the further extension of it to future legislation.' Again in *Ferrand v. Wilson* (1845), 4 Hare 344, where a tenant in tail expectant on the death of a tenant for life, claimed relief on the ground that a previous tenant for life had wrongly exercised a power of exchange by accepting property of inferior value, Vice-Chancellor Sir James Wigram said at p. 385, 'The plaintiff's equity to relief in respect of this exchange will be found to resolve itself into that which, for the argument, I will admit to be a defect in the jurisprudence of this country,—namely, the want of a jurisdiction to ascertain and declare rights before a party interested has actually sustained damage. . . . I fear the plaintiff must be left to the imperfect and unsatisfactory proceeding of a bill to perpetuate testimony as to the value of the property at the time of the exchange.' In the case of *In re Roberts* (1881), 19 Ch. D. at p. 533, the late Master of the Rolls, when asked to declare that a gift over was valid and took effect on the death of the then present tenants for life, said, 'If I could see any way to such a declaration, I should concur in making it.' And in the following year when giving judgment in *Curtis v. Sheffield* (1882), 21 Ch. D. 1, he said, 'where all parties who in any event will be entitled to the property are of age and are ready to argue the case, the reason of the rule departs, and it becomes a bare technicality. . . . utility seems to demand that there should be a power to determine their rights, as is the case in Scotland and in many other countries.' Here the Court of Appeal refused to give leave to appeal from a judgment declaring future rights, the declarations having been made 46 years

before and all parties having been represented by counsel before the Court. The Master of the Rolls remarked that he knew 'that the practice of Vice-Chancellor Shadwell was frequently to disregard the rule or practice of the Court of Chancery in this respect, and to make declarations in this form at the request of the parties.'

In the whole class of cases which arise upon executory trusts, and specially those contained in marriage articles, the Court daily takes upon itself not to declare only but, saving the hypothesis to the contrary, boldly to manufacture interests in remainder to the frequent detriment of the earlier taker. Again where leaseholds are taken under the Lands Clauses Consolidation Act 1845, the Court will decide as to whether the lessee has any right of renewal for which he may claim compensation, as in *Bogg v. M. R. Co.* (1867), L. R. 4 Eq. 310.

It is clear then that not only have most eminent judges declared in favour of the proposed jurisdiction, but some have availed themselves of incidental questions to decide material issues, others, at least Vice-Chancellor Shadwell, have made declarations of future rights where the parties assented, and it is of every-day practice in the case of marriage articles and where lands are taken under the L. C. C. Act<sup>1</sup>. It is difficult to perceive what objection there can be to the extension of the limited jurisdiction which is already exercised. If the Court will decide a question of *locus standi* as in *Bell v. Cade* or of waste as in *Forsbrook v. Forsbrook*, and refuse leave to appeal after lapse of time as in *Curtis v. Sheffield*, it would seem reasonable to give direct jurisdiction where there is now only indirect.

Closely connected with the rights of remaindermen to have their interests judicially determined during the lifetime of the prior taker is the right of the person who takes on the happening of any other event than death, e. g. in cases of forfeiture. Here the chief reason for ascertaining the respective rights of the parties is the protection of the person in actual enjoyment rather than

<sup>1</sup> In *Evans v. Manchester S. & L. R. Co.* (1887), 36 Ch. D. at p. 640, which was a case of flooding of a mill occasioned by the subsidence of a canal, Kekewich J. said, 'I see no reason, having regard to the evidence, why I should not further declare that the defendants are liable, and will be liable to make good to the plaintiff any damage occasioned by the escape of water from the canal on to the plaintiff's premises consequent upon any further subsidence of the canal. The evidence so clearly contemplates that further subsidence, and the question has been so directly put in issue here, that I think there is no impropriety in doing that which is not generally desirable, namely, making a declaration with regard to the future.' There seems no doubt that according to the present state of the law, the jurisdiction of the Court was exceeded in this case; but it is clear that the jurisdiction, if existing, was usefully exercised, as compensation for the injury could only be obtained as provided by defendant company's special Act, and therefore the amount of the future liability could not in any case be worked out in the action. In *Bradbury & Co. v. Sharp* (1891), W. N., p. 143, the same learned judge granted an injunction to protect future numbers of *Punch* from infringement. Apparently this was done by consent of the parties.



of the one who takes on forfeiture. Of course this proposal goes a step further than the first, as there are not, strictly speaking, any future rights in the remainderman until the happening of an uncertainty, but it seems fair that a person in actual enjoyment should, at his own risk as to costs, be able to obtain a judicial decision as to the validity and meaning of a forfeiture clause, and its application to circumstances which may or may not arise.

In Scotland the declarator or declaratory action is a class of action which bulks very considerably in the forms of litigation there obtaining, and is much more extensive than the English declaratory action, which is regulated by Order 25, r. 5<sup>1</sup>. In Bell's Commentaries it is said, 'This is a form of action by which some right of property, or of servitude, or of status, or some inferior right or interest is sought to be judicially declared.' It is usual to include claims for immediate relief besides the declarations sought for, but this is not necessary. 'The effect is that in petitory or possessory actions, the defender is excluded from any defence that might have been proposed in the declaratory action. Stair B. *iv.* tit. 3, § 47. . . . In order to entitle a party to bring an action of declarator, he must show that he has a substantial interest to insist in the declaratory conclusions, and that it is an interest of which the Court can competently judge. . . . The process is not intended to declare rights which are clear, and are not attacked; nor remote and contingent rights, unless they are disputed.'

In Professor Mackay's 'Practice of the Court of Session,' it is said at p. 94, 'Where a right future and even contingent is disputed, and there is a proper contradictor, a declarator will be sustained.'

'Thus declarator and not multiplepounding is the appropriate action to determine a disputed question of vesting, where there is no fund *in medio*, but only one *in spe*; and where the validity of a provision payable only on the occurrence of a future event was disputed, declarator was held competent.'

Here then we have the very jurisdiction which seems desirable in England, an action of declarator with or without the claiming of relief and extending to both future and contingent rights, and framed either as an ordinary action or as a special case.

Where all the parties are in existence who could possibly claim there would seem to be no difficulty in proceeding, and in other cases, rule 32 of Order 16 might well be extended to meet the case

<sup>1</sup> The rule is as follows :— 'No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.'

of an heir, next of kin, or a class interested in a future or contingent right. The rule at present runs as follows:—‘In any case in which the right of an heir-at-law or the next of kin or a class shall depend upon the construction which the Court or a Judge may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such heir-at-law, or next of kin, or class. . . . the Court or Judge may appoint some one or more persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court or Judge in the presence of such persons shall be binding upon the heir-at-law, next of kin, or class so represented.’ Other rules refer to the representation of numerous and absent parties, of the estate of a deceased person, &c. There seems to be no rule at present by which a person who is neither an heir-at-law, next of kin, nor member of a class can be represented, where difficult to ascertain or non-existent.

The proposed alteration in the law should be so framed that it should not interfere with the rule that a person who has only a possibility of interest or a mere *spes successionis* cannot invoke the assistance of the Courts (*Clowes v. Hilliard* (1876), 4 Ch. D. 413); but apart from this proviso there seems no reason why a decision should not be obtained in every case where there is a ‘competent contradictor’ either in his own right or by representation. A document, whether will or settlement or of whatever nature, which is meant to create rights, should be expounded by the Courts as soon as it comes into operation: and if this cannot be done at present, let our rules as to representation of absent or non-existent parties be extended, leaving, however, with the Court a discretion to refuse adjudication where full argument is impossible. In this way cases like *Greenwood v. Sutherland* (1853), 10 Hare App. 12, and *Garlick v. Lawson*, *ib.* p. 14 would be decided without waiting in the one case to see if a substitutionary gift would take effect by predecease of the legatee and in the other for birth of descendants more remote than children, who could contest the meaning of the word ‘issue’ with their aunts and uncles.

W. A. BEWES.

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CONVEYANCING UNDER THE PTOLEMIES<sup>1</sup>.

NOT the least interesting of the recent wonderful archaeological finds in Egypt are some apparent wills and other legal documents of Macedonian and heterogeneous Hellenistic mercenaries settled in Egypt under the first three Ptolemies. I say *apparent* wills, for we do not know enough of the system of Jurisprudence to which they belonged to be quite sure that they are not exercises of powers or else instances of some such trust-disposition as (until recent legislation afforded a means of defying reduction *ex capite lecti*) sufficed North Britain in lieu of a will properly so called. Whether, as a fragment not later than 235 B.C. probably indicates, these testators' own contemporaries, or only a later generation, adopted the Egyptian mode of burial, their testamentary habits and their language are—except for a few Egyptian month-names—evidently Hellenist.

Rome has been to us moderns so exclusively the mouthpiece of classical law that the subject of conveyancing among the Hellenistic soldiers within half a century of Alexander the Great's death must hitherto have been *terra incognita* to even the most archaeologically-minded of English lawyers—though sixty years ago the French scholar Letronne knew that 'les fragments de papyrus qui ont servi à former le cartonnage d'une momie' were covered with writings which seemed 'avoir rapport à des contrats de vente, à des transactions particulières et à des circulaires administratives.'

But what Letronne adjudged 'trop mutilés pour qu'on en puisse tirer rien de suivi' have richly repaid the indefatigable researches of Mr. Flinders Petrie, who quite independently hit upon Letronne's method, and handed to Professors Mahaffy and Sayce for decipherment this priceless waste paper of twenty-one centuries ago!

The literary portion of this treasure-trove is not for us to handsel here, and we must leave to the Psychical Society the record that 'a boy appeared to be on the columns in the country-house of Metrodorus,' but the wills—whether official copies, as Professor Mahaffy thinks, or only rough drafts, as Professor Sayce infers from their numerous corrections and interlineations—are our proper and profitable prey. It seems indeed hardly likely that

<sup>1</sup> 1. 'On the Flinders Petrie Papyri,' with Transcriptions, Commentaries, and Index. By the Rev. John P. Mahaffy, D.D., &c., with thirty Autotypes. Dublin: at the Academy House. 1891.

2. 'Ikahun, Kahun, and Gurob, 1889-90.' By W. M. Flinders Petrie. London: Nutt. 1891.

several testators should have used, as we find here, continuous instead of separate sheets for the autographs of their respective wills, and Professor Mahaffy even thinks that 'Theison,' in Plate XX (2), line 6, is probably the name of the scribe who began copying a fresh set of wills; at the same time, the idiosyncrasies of wording make it likely that the testators were their own conveyancers.

The cup-like oasis of the Fayyum where these strange relics were discovered sinks to a depth of 130 feet below the surface of the Mediterranean, and as early as 2300 B.C. (according to Brugsch Bey) was the scene of great reclamation works by Amenemha III and other Egyptian Kings of the twelfth dynasty. The capital of this oasis was the old Crocodilopolis, which was renamed Arsinoë (like many other cities) after Ptolemy Philadelphus' influential sister and second wife. In these fragments it is always called Crocodilopolis, never Arsinoë, but Professor Mahaffy ingeniously suggests a connection between the establishment here of her incestuous husband's veterans and the fishery royalties, traditionally said to have been rendered to the Queens of Egypt from this particular locality even in Persian times.

A witness to one of these wills is described as τῆς τετάρτης ἱππαρχίας ἐκατοντάρουπος, 'of the 4th cavalry regiment, holder of 100 arourae,' and Professor Mahaffy thinks we may presume that the veterans here described as κληροῦχοι or τῆς ἐπιγονῆς were bound to keep a horse as a condition of their tenure. If they were really the ἱππεῖς τῶν κατοίκων whom Ptolemy Philopator—according to Polybius—called out in answer to the threat of a Syrian invasion, their establishment in the Fayyum may be regarded as an intermediate link between the Chaldæo-Persian system of transpatriation and those settlements of Roman veterans to defend the borders of the empire, out of which (among other things) it seems likely that mediæval Feudalism sprang.

The mention of inspectors of horse (ἵπποσκόποι) and of the settlers who have not yet come to the settlement (τῆς ἐπιγονῆς τῶν οὐπω ἐπηγμένων) seems to show a deliberate policy at work, though it must be admitted there seems no trace of that subinfeudation and private jurisdiction which are elements of true feudalism.

The tie, however, which bound his mercenaries to Ptolemy must have been so far feudal as being founded much more upon a reciprocity of service and protection than upon any supposed community of blood, and even if every settler held directly of the king, yet that would not of itself necessitate the Fayyum's being less strictly feudal than was England after the Conqueror's great assembly of all his tenants on Salisbury Plain.

The kingship of the royal pair is never territorially defined, while another point of discrepancy from mediaeval feudalism is to be observed in Arsinoë's giving her name to, instead of taking a name from, a place.

Each of these Fayyum wills falls into well-marked divisions which I have endeavoured to exemplify as follows, piecing together actual phrases occurring in different wills.

I. First comes the date in this style:—

'In the reign of Ptolemy son of Ptolemy and Arsinoë, gods-brethren ["brethren" in Ptolemaic titles must be understood in the sense of the German "Geschwister"—brother and sister—and the heinous incest of Ptolemy's second matrimonial venture followed not only the mythical example of Osiris with Isis and of other heathen deities galore but the historical examples of many Pharaohs besides the great Rameses, whose colossal statue has been just discovered in rose granite near Aboukir; and set an example—if either dynasty had dreamt of it—to equally blasphemous Inca royalties all the world away in Peru !], the ninth year, Apollonides, son of Moschion, being priest of Alexander (i. e. the Great), and of the gods-brethren and of the gods-benefactors, the Canephorus (a priestess) of Arsinoë Philadelphus being Menekrateia, daughter of Philammon [often "for the second time," though the priesthood was eponymous] on the tenth day of the month Thoth [Θωθ, or "of Daisios," using now the Macedonian, now the more accurate Egyptian calendar, or both] in Crocodilopolis of the Arsinoïte nome.'

II. Then comes a phrase intended to preclude dispute as to testamentary capacity:—

'Being of sound mind and good understanding,' νοῶν καὶ φρονῶν.

III. 'Kalas, the Macedonian [another testator is a Libyan, another a Syracusan, while the presence of a village named Σαμάρεια, coupled with other evidence, makes it almost certain there were Hebrews among the settlers], son of Deinias, made the following disposition (τάδε διέθετο), being eighty years old, of the guards [another is described as a "man of business," if that be the meaning of the new noun χρηστήριος], tall, curly-haired.'

Others are described as of 'middle height' or 'with a poor beard' (σπανοπύγων), 'olive complexioned, a scar under his left eyebrow,' &c., &c.

IV. Then comes the disposing part, prefaced by a euphemistic phrase intended doubtless to disarm the awful apprehension lest death should ensue the more rapidly in consequence of making a will:—

'May I be in good health and manage my own affairs as I choose. If, however, I suffer anything human, I leave my income from the treasury [or "my property in the furnaces of the Arsinoïte nome"; or "the debts due to me" or "my corseleteer's girdle"] and

my horse and armour to my son Peisicrates, my allotment to Deinon, my securities to my wife.'

This part of the will in one case concludes with a phrase which means (with all deference to the able commentator) not 'nothing to nobody else,' but 'not nothing to nobody else,' a triple negative which is logically more defensible than the commoner Greek double denial.

Here often follow such provisions as:—

'For the mourning at my funeral I leave the following provision to wit:—\*\*\*. I set free my son Ammonius and his mother Melaenis [or possibly "the negress." Another will liberates "Semele and the six children she now has"], provided they stay with me as long as I live. I set free others of my slaves to wit:—'

V. 'I leave as executor (or trustee, *ἐπίτροπον*) Pyrrhus's son, the Heracleote.'

[Later wills generally say:—'I choose as executors King Ptolemy, son of Ptolemy and of Arsinoë, gods-brethren, and Queen Berenice, King Ptolemy's sister and Queen, and their children.']

VI. Then follow the names and descriptions of the witnesses, of whom there were normally six, a contract with six witnesses (*συγγραφὴ ἑξ μαρτύρων*) being a technical term, as we learn from another papyrus, to distinguish one class of documents from others, such as a conveyance on sale, which required sixteen witnesses.

Before Mr. Petrie's find in the Fayyum it was known to scholars that a Greek testator must be *εὐ φρονῶν*, or at least *οὐ παρανοῶν*; that wills were kept in public archives, and that it was important to have numerous witnesses.

We knew further that Isaeus speaks of solemn imprecations at the end of a will—a feature conspicuous by its absence in the Fayyum wills, which have no concluding formula at all. He adds 'that no one bequeaths to his sons, who are heirs by law of his property,' and possibly this may be the case as to the real property of the Egyptian Greeks, for we only find the land (the *κληρος*) mentioned in one fragment, unfortunately with the context so mutilated that we cannot tell more about it.

As to all other property, however, these wills contain several bequests to at any rate single sons as sole beneficiaries; and a phrase in the will of Demetrius, son of Deinon (237 B.C.), Plate XIV, ll. 9, 14, 15, *καταλιμπάνω τὰ ὑπάρχοντα . . .* . . . *τὰ δὲ λοιπὰ ὅσα . . . νυ . . . [κτ]ησῶμαι . . . καταλείπω*, suggests that even after-acquired property may have been controlled by the will.

Another Greek will, probably of about the same date with these, has been known to scholars since 1750, and Professor Máhaffy very pertinently bespeaks more careful attention to a document which,

even taken alone, might well 'lead the jurists to reconsider the position they have maintained that the full and free right of bequeathing was not admitted or practised till its development by Roman lawyers and in Roman society.' Freedom of bequest, indeed, whether because they were not of Latin race, or *were* highly or were *not* highly civilized, or for whatever reason, seems to have been complete among these Hellenists, and to have been ungrudgingly, perhaps even pityingly extended to an octogenarian sojourner (*παρεπιδημος*), whose will enured to the exclusive behoof of a certain Axiothea—apparently not even his connection by marriage!

How far removed is this from the testacy permitted at Athens only to Athenians-born, and only *if they were childless* and free from female influence! *ἄξιον δὲ καὶ τοῦτο ἐνθυμηθῆναι ὅτι ὅσοι μὴ ἐπεποίητο ἀλλ' ἦσαν πεφυκότες γνήσιοι τοῦτοις ὁ νόμος δίδωσιν ἐὰν ἀπαιδὲς εἰσὶ διάθεσθαι τὰ ἑαυτῶν. ὁ τούτων πατὴρ ἡμῶν ἐπεποίητο ὑπὸ τοῦ δήμου πόλιν. ὥστε οὐδὲ κατὰ τοῦτο ἔξην αὐτῷ διάθεσθαι διαθήκην.*

*σκέψασθε δὲ καὶ διότι οὐδ' ἂν ἀπαις τις ἢ κύριός ἐστι τοῦ τὰ αὐτοῦ διαθέσθαι ἐὰν μὴ εὖ φρονῇ· νοσοῦντα δὲ ἢ φαρμακῶντα ἢ γυναικὶ πειθόμενον ἢ ὑπὸ γηρώς ἢ ὑπὸ μαυῶν ἢ ὑπὸ ἀνάγκης τινὸς καταληφθέντα ἄκρουν κελεύουσιν εἶναι οἱ νόμοι.* (Demosthenes, κατὰ Στεφάνου Ψευδομαρτυρίων, II. 433.)

Woman seems, on the other hand, to have been very independent in the Fayyum, as her guardian (*κύριος*), elsewhere indispensable, is only once mentioned. This single mention occurs (Plate XXI) in a will from which it might be argued that no Mortmain Act was in force under the Ptolemies.

Perhaps, however, even if there had been a Mortmain Act no king would have found heart to put it in operation against the will of a Libyan who left two adjoining town houses—the abutments neatly veering all round the compass—for a shrine for the cult of the reigning queen and her mother!

Since most of the above was written Prof. Mahaffy, in *The Athenaeum*, Nov. 7, 1891, has described a new discovery which enables him to make the following suggestion as to the evidently somewhat ill-distinguished regal and religious rights in the third century B. C.:—

'One thing seems plain. Altars were the recognized mark of houses in which soldiers or public servants could find billets; and the owners, while they were afraid to destroy them, had moved them into an inconspicuous place inside a built-up door. The order is to rebuild them in a place where everybody can see them. I can find no other meaning than *altar* or *platform* for the Greek word [*βωμὸς*], and therefore feel that we are in presence of a novel fact. The only suggestion which occurs

to me is that in every city a certain number of houses or of building plots were granted by the Crown on condition of supplying billets when required. This lien or duty to the Crown was publicly designated by an altar to the deified sovereign, which may have had little more religious meaning than the royal coat of arms now set on state buildings. To destroy these altars may have been a grave crime, not so to move them to a new place in the house. Such a hypothesis would account for the statements in this curious document.'

Verily, one feels tempted to extend the hypothesis even further, and to ask whether the 'fathom-long animals in stone' (*ζῶα λίθινα τετραπήχη*), which Aristotle, by his will, left instructions for erecting 'in Stageira to Zeus Soter and Athena Soteira' (Diogenis Laertii de vitis, dogmatis et apophthegmatis eorum qui in philosophia claruerunt. Lib. V. Aristoteles segm. XVI), were not really the lion and the unicorn!

The legal documents other than wills are less interesting, but one records a judgment or arbitration, with the names of the parties, and of the judges or arbitrators. Another is a bond charging the obligor's realty. Professor Mahaffy renders conjecturally: 'I undertake to make a return of the produce of my parks (*παράδεισων*) to the amount of 450 drachme, and promise to pay the half in the month Payni and up to the month Epeiph in the current year. But concerning the debts charged against me which I dispute, I shall submit to the decision of Asclepiades, and if I be not acquitted but the case be decided against me, I shall give an additional bond in the month Mesorè, and if the whole be not paid then, I will pay 50 per cent. over and above the money (as fine), and let the recovery of this be the summary process of recovering moneys due to the Crown.'

Another is an account for the measurement of works, apparently in the delimitation of allotments.

One of the most curious features of these documents are some entirely new ideograms, of which one seems to stand for drachmae, another for years, another perhaps for centurion, while some cannot be at all satisfactorily interpreted. But, however interesting, they shed at present no further light upon Ptolemaic Conveyancing.

E. P. FRY.



## MARRIED WOMEN'S DEBTS.

**T**HE great majority of Englishmen are content to remain in a blissful state of ignorance of the rules which decide their rights and liabilities in the ordinary transactions of every-day life. It is true that many of them are guided by certain authoritative rules well known to the lay mind and phrased in non-legal language; an example is the following: 'If you take care not to put your name to a piece of paper you are not bound by any conversation relating to the selling or letting of land or a house.' And another is, 'That since the Act of 1882 a married woman is just as much bound by a contract as she would be if she were unmarried.' It is the object of the present paper to show how far the latter statement fails of being true. In the nine years that have passed since the Act came into force there have been numerous decisions on the subsections of section 1 which deal with the contracts of married women. It may be doubted whether the Courts have in all cases interpreted these subsections in the manner intended by those responsible for the wording of the Act. And in more than one instance the judges have confessed that they have decided the case in a certain way with great reluctance, because they felt that they were constrained by the words of the statute. In other instances they have allowed that the law on this subject is in an anomalous condition, and have excused themselves on the ground that they only declare the law, and that if the law as declared by them is anomalous it is a matter for the legislature to remedy.

The portions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), dealing with this subject are:—

Sect. 1, subs. 2. A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of being sued—in contract—in all respects as if she were a feme sole, and her husband need not be joined with her as defendant—and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise.

Sect. 1, subs. 3. Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shown.

Sect. 1, subs. 4. Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but all separate property which she may thereafter acquire.

To all appearances these three clauses are a tolerably complete code on the subject. It is true that in no case is the property of a married woman referred to without the adjective 'separate,' but the combined effect of sect. 1, subs. 1, and of sect. 5 is that all the property of a married woman, 'her title to which, whether vested or contingent, and whether in possession, reversion, or remainder,' accrued after January 1, 1883, is her separate property within the meaning of subsections 2, 3 and 4 of section 1. The real difficulty which the judges have found in interpreting these subsections has arisen from the words in sect. 19: 'Nothing in this act shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument.' These words are in effect an interpretation clause of the words 'separate property,' and shew that in each case in section 1, subsections 2, 3 and 4, they must be used as equal to 'so much of her separate property as is not subject to any restraint on anticipation,' a cumbrous expression which in this paper will often be represented by the words 'free separate property.' (See the judgment of Day J. in *Braunstein v. Lewis* <sup>1</sup>.)

It was laid down long ago in *Haydon's case* (3 Rep., 7 B.) that one of the most material things to consider in construing an Act of Parliament is the state of the law before the Act and the defect in that law which the Act was intended to remedy. In 1881 the attention of the profession was called to the decision of the Court of Appeal in *Pike v. Fitzgibbon* <sup>2</sup>. The Lords Justices there reversed the decision of Malins V.C., and decided that as the law then stood the contracts of a married woman could only be enforced against the identical free separate property, or the residue of the free separate property (remaining to her at the date of the judgment) which she had possessed at the time of entering into the contract. James L.J. stated that 'it must be taken to be the distinct and deliberate judgment of the Court of Appeal that the proper enquiry to be inserted was what was the free separate property which the defendant had at the time of contracting the debt or engagement, and whether that separate property or any part of it still remained, and was capable of being reached by the judgment of the court?' The result

<sup>1</sup> *Braunstein v. Lewis* (1891), 64 L. T. N. S. 265; Day J.

<sup>2</sup> *Pike v. Fitzgibbon* (1881), 17 Ch. D. 454; James, Brett, and Cotton L.JJ.

was that the free separate property of the married woman at the date of the contract was the only source from which the creditor could hope for satisfaction of his claim, and the married woman had the privilege of effectively defeating his hopes by alienating that special fund at any time between the date of the contract and the date of the judgment against her.

This was thought to be a hardship on the creditor, and it was in this state of affairs that the Act was passed, and it is here proposed to give an account of the more striking decisions on this subject, and to explain (1) how much special matter the creditor of a married woman is required to prove, and (2) what are his rights against his debtor when he has brought the trial to a successful issue.

(1) The special matter that the plaintiff is required to prove in an action on a contract entered into by a married woman beyond that which is sufficient in a similar action against a man.

(a) The plaintiff must prove that at the time of entering into the contract the defendant was in possession of separate property free from any restraint upon anticipation.

*Palliser v. Gurney*<sup>1</sup> was an action tried in the City of London Court for the price of goods sold and delivered. The defendant admitted the sale and delivery of the goods, but the plaintiff was not provided with any evidence that the defendant was possessed of free separate property when the goods were ordered. He was non-suited, and Lord Esher M.R. and Lindley and Lopes L.JJ., sitting as a Divisional Court, affirmed that decision. 'To entitle the plaintiff to succeed he must prove the existence of some separate property at the time of entering into the alleged contract.'

Notwithstanding this decision in January of this year the plaintiff in *Braunstein v. Lewis*<sup>2</sup> attempted to establish his claim before Day J. In this case the defendant was entitled to very considerable property, but all of it was subject to a restraint upon anticipation. The plaintiff was a solicitor, and he had a bill against the defendant for £400 in respect of the defence of an action on her behalf. On August 9, 1887, the defendant executed a deed purporting to be a mortgage of her separate estate to secure the payment of the £400. The defendant admitted that on August 4 and on August 9 she had drawn from her bank £50 and £57 respectively, and said that thereby her banking account was overdrawn by £88, but she also stated that she had spent the whole of the £107 before the deed

<sup>1</sup> *In re Shakespear* (1885), 30 Ch. D. 169; *Pearson J. Palliser v. Gurney* (1887), 19 Q. B. D. 519; Lord Esher M.R., Lindley and Lopes L.JJ. This case was confirmed in the Court of Appeal in *Stogdon v. Lee* (1891), 1 Q. B. 661. See also *Telley v. Griffith*, (1887,) 57 L. T. 673.

<sup>2</sup> *Braunstein v. Lewis* (1891), 64 L. T. N. S. 265; Day J.

was executed, so that the interesting question whether the possession of, say, twenty-five sovereigns in her purse, though her banking account was overdrawn more than three times that amount, would have been sufficient under subsection 3 to support a contract to pay £400 (*vide* p. 67, *infra*) was not open for decision. Day J. decided that 'at that time this woman had no capacity to make this contract (i. e. to execute the mortgage) under the statute or otherwise, and that she is entitled to judgment with costs.' The only basis of the action, and the only case cited by the counsel for the plaintiff in his first speech, was *Whittaker v. Kershaw*<sup>1</sup>. There the Court of Appeal had decided that a married woman, though she had no free separate property, was liable to judgment in an action to compel her to refund to executors the amounts paid by them in respect of calls on shares in a joint stock company which had been bequeathed to her by their testator, but which had not been transferred to her at the date of the payment of the calls: The Lords Justices distinguished the case from one of contract. 'The power to contract is distinct from the liability to be sued, for the section says that she shall be liable to be sued in contract or in tort or otherwise. We cannot disregard the words "or otherwise,"' per Cotton L.J. 'The effect of sect. 1, subs. 2 as it appears to me is to allow a married woman to be sued in respect of anything in respect of which a man could be sued subject to this, that her power to contract is limited, and the remedy is confined to her separate estate,' per Fry L.J., so that the Lord Justice emphasizes the distinction to which Day J. gave effect in the later case. 'The power of a married woman to contract is limited' by her possession of free separate estate at the time the contract is entered into.

*Everett v. Paxton*<sup>2</sup>, decided by a Divisional Court on April 23 of last year, is an interesting example of the effect of this requirement. The lady had no free separate property save some furniture, but she received an income of £300 per annum from the solicitor to the trustees of her marriage settlement, which was paid to her in varying amounts and at irregular intervals. She lived in her house rent free, and had the power to, and occasionally did, sublet it, and on such occasions she received the rent. The plaintiff was a grocer, and he sued in the Eastbourne County Court for the balance of his account, which amounted to £53 19s. 4d. for goods supplied from time to time between January, 1888, and May, 1889. The County Court Judge found for the plaintiff, and in the Divisional Court the Judges differed as to the proper inference to be drawn from the facts, but Smith J. (whose judgment prevailed)

<sup>1</sup> *Whittaker v. Kershaw* (1890), 45 Ch. D. 320; Cotton, Bowen, and Fry L.JJ.

<sup>2</sup> *Everett v. Paxton* (1891), 7 T. L. R. 465; Smith and Grantham JJ.

decided that the plaintiff could only recover in respect of those items in his account which he could prove to have been ordered by the defendant when she had in her possession some of her income received from her trustees and as yet unspent; that if the plaintiff wished, he might attempt to establish his case on this footing at a new trial on condition that he first paid all the costs as yet incurred, and that otherwise there should be judgment for the defendant with costs. In this case there was no question as to the justice and propriety of the plaintiff's claim, but the result shews that a married woman, who is in receipt of a handsome income, which is subject to a restraint upon anticipation, may be under no legal liability to pay her tradesmen's accounts if she is astute to give her orders after she has parted with the whole of the last instalment of her income. Doubtless such cases as *Everett v. Paxton* are not common, but when they do occur they bring additional discredit on the law of England.

(b) If the plaintiff prove that at the date of the contract the married woman was in possession of some free separate property, then there is a presumption that she contracted with respect to and to bind her separate property, unless the contrary be shown (sect. 1, subs. 3).

At first the onus lies on the plaintiff to establish the possession of free separate property; then the burden of proof is shifted to the defendant, who has to show that she did not enter into the alleged contract with respect to or to bind her separate property.

Two decisions on this point may be referred to. In *Harrison v. Harrison*<sup>1</sup> the contest was about the costs of the solicitor who had acted for the wife in a divorce case which had resulted in a decree for the dissolution of the marriage on her petition. At the time of the petition the wife was entitled to considerable separate property, but it was included in her marriage settlement and was held to her 'sole, separate and inalienable use.' The Court of Appeal reversed the decision of Butt J., and decided that these words were equivalent to a restraint upon anticipation and that 'the contrary was shown' as required by subsection 3. 'The fact of the separate estate being inalienable precludes the suggestion that the contract she made with the solicitor was made in respect of that separate estate,' per Cotton L.J. 'It turns out that the property was inalienable. That, in my judgment, "shows the contrary" to the assumption that the contract was entered into by this married woman with respect to her separate property, for she cannot be deemed to have entered into a contract with respect to property that she could not alienate,' per Fry L.J.

<sup>1</sup> *Harrison v. Harrison* (1888), 13 P. D. 180; Cotton, Bowen, and Fry L.JJ.

In *Leake v. Driffield*<sup>1</sup>, the married woman had an income of £107 per annum settled to her separate use without power of anticipation. In November, 1884, she and her husband arranged that she should clothe herself and her children from her income of £107. The plaintiffs were certain drapers, and they brought an action in respect of clothes supplied between March, 1884, and May, 1886. The defendant had promised to pay for the clothes herself, and had always intended to do so. The County Court Judge gave judgment for the plaintiffs on the ground that the contract was valid at its inception, because at that time the defendant possessed some free separate estate, the wearing apparel of herself and her children, though she had no other property with respect to which she could be deemed to have contracted. The Divisional Court gave judgment for the defendant. 'She cannot be presumed to have contracted with respect to property that she could not do without,' per Mathew J. 'It would be absurd to assume an intention in the defendant to enter into a contract under which she was professing to bind her own and her children's clothes,' per Wills J.

It is submitted that these two cases leave the interpretation of subsection 3 in an unsatisfactory state: for the latter case seems to introduce the further requirement that there must be some necessary relation between the amount of the free separate property in possession at the date of the contract and the amount of the liability which the married woman incurs by the contract. To take a concrete case: a married woman, with no other free separate estate save two sovereigns in her purse and the clothes she is wearing, on the same day orders groceries to the value of £1, a sealskin jacket worth fifty guineas, and jewellery worth two hundred pounds. She pays for nothing: the goods are delivered in due course, and consumed or used. She fails to pay the bills. Can the several shopkeepers bring actions against her with a reasonable hope of success? The judgment of Smith J. in *Everett v. Paxton* is decisive that the grocer would be successful if he could prove that the two sovereigns were in the purse of the defendant when she gave him the order. And the mantle-maker and the jeweller might hope to distinguish their cases from *Leake v. Driffield* on the same ground, but the mantle-maker would be met by the forcible argument that the defendant cannot be deemed to have entered into a contract to pay fifty guineas with respect to and to bind two sovereigns; and if the Court were persuaded to hold that the possession of the two sovereigns was sufficient to support the contract to pay fifty guineas, would it be sufficient in the case of the jewellery worth

<sup>1</sup> *Leake v. Driffield* (1889), 24 Q. B. D. 102; Mathew and Wills JJ. See also 61 L. T. N. S. 771, for another and somewhat different report of the same case.

two hundred pounds? In *Leake v. Driffield*, Wills J. intimated that the possession of a 'scintilla of property,' bought with the income and so free from restraint, would not be sufficient. The *ratio decidendi* that case was that the defendant could not be deemed to have contracted with respect to property that she could not do without! Would the case have been decided in the same way if the 'property' had been an extensive wardrobe, valuable pictures, horses, &c.? Would the same reasoning apply to a gold repeater worth thirty or forty pounds, and to a Waterbury watch in a house where there was no clock?

(c) Is it necessary that the plaintiff should prove that the married woman (the defendant) is in possession of free separate property at the date of the judgment?

In *Downe v. Fletcher*<sup>1</sup> Lord Coleridge and Mathew J. decided that such proof is not necessary when the debt was contracted before marriage, though the marriage had taken place since the coming into operation of the Act of 1882; but in the course of a short judgment the latter judge said 'such evidence may perhaps be necessary as regards a debt contracted during coverture.' It is submitted that it is unnecessary. There is no case known to the writer which decides the point, but the policy of the decisions has been to preserve to the married woman unimpaired by any temporary extravagance the separate property, the income from which one is restrained from anticipating. This is adequately provided for by the terms of the judgment in use where a married woman is an unsuccessful defendant, and there seems to be no reason grounded on principle why the plaintiff should not have the satisfaction of having the judgment entered in his favour, and thereafter takes his chance of finding some property liable to satisfy it. There are some hints that the judges would look favourably on such an argument. By a question asked during the argument in *Whittaker v. Kershaw*<sup>2</sup> Bowen L.J. intimated that he had no determined opinion on the point. In *Meager v. Pellew*<sup>3</sup> the judgment was obtained without any objection from the female defendant that she had no free separate property, though Brett M.R. expressly said that there was no evidence that she had any (p. 976). *Arguendo* the case of *Conolan v. Leyland*<sup>4</sup> before Chitty J. the point was put neatly by Romer J.: 'The courts simply gave the order for what it was worth, and then if she had no separate property it could not be enforced.'

<sup>1</sup> *Downe v. Fletcher* (1888), 21 Q. B. D. 11; Lord Coleridge C.J.; and Mathew J.

<sup>2</sup> *Whittaker v. Kershaw* (1890), 45 Ch. D. 320.

<sup>3</sup> *Meager v. Pellew* (1884), 14 Q. B. D. 973; Brett M.R., Baggallay and Bowen L.JJ.

<sup>4</sup> *Conolan v. Leyland* (1884), 27 Ch. D. 632.

(2) The rights of the plaintiff against a defendant married woman after he has brought the trial to a successful issue.

The statute says 'and any damages or costs recovered against her in any such action shall be payable out of her separate property and not otherwise,' sect. 1, subs. 2. It is unnecessary to refer at any length to the case of *Draycott v. Harrison*<sup>1</sup>, for that decision was subsequently confirmed and the law was settled by the Court of Appeal in the famous case *Scott v. Morley*<sup>2</sup>. There Kekewich J. as vacation judge made an order under sect. 5 of the Debtors Act 1869 against the female defendant, and committed her to prison for six weeks for non-payment of a judgment debt. The Court of Appeal reversed this decision on the broad ground that the creditor of a married woman is to obtain satisfaction from her separate property and 'not otherwise': that the act created a proprietary and not a personal liability; that the debt is only due from the married woman 'sub modo'; that she can only be compelled to pay it out of her free separate property. This case has settled the practice and execution on a judgment obtained against a married woman is 'limited to her separate property not subject to any restriction against anticipation unless by reason of sect. 19 of the Married Women's Property Act 1882, the property shall be liable to execution notwithstanding such restriction'<sup>3</sup>.

It has been mentioned that before the Act of 1882 the contracts of a married woman bound only the free separate property which she was possessed of or entitled to at the date of the contract. Sect. 1, subs. 4 was intended to alter the rule laid down in the case referred to<sup>4</sup>, and it enacted that the contract of a married woman should bind 'also all separate property which she may thereafter acquire,' and the law is clear that the creditor can call in aid to satisfy his debt all the free separate property in the possession of the married woman at the date of the execution on the judgment whether such property was acquired by her before or after the date of the contract.

But if the coverture should be determined before the creditor has brought his action, what is his position? If the marriage be dissolved by the death of the husband it might be argued that the creditor has lost his remedy, for it could only be exercised against the free separate property of the wife and the law knows not 'the separate property' of a *feme sole*. And it is doubtful whether *Surnam v. Wharton*<sup>5</sup> would be decisive of this case in favour of the creditor. There the wife predeceased the husband and he was her

<sup>1</sup> *Draycott v. Harrison* (1886), 17 Q. B. D. 147; Mathew and Smith JJ.

<sup>2</sup> *Scott v. Morley* (1887), 20 Q. B. D. 120; Lord Esher M.R., Bowen and Fry L.JJ.

<sup>3</sup> 20 Q. B. D. 132.

<sup>4</sup> *Pike v. Fitzgibbon* (1881), 17 Ch. D. 454.

<sup>5</sup> *Surnam v. Wharton* (1891), 1 Q. B. 491.



legal personal representative within the meaning of sect. 23 of the Act. And it was held that to the extent of her separate property that had devolved upon him at her death, he was liable to repay money that had been borrowed by his wife. And the Court declared that 'the determination of the coverture does not free from liability property that would have been liable if the coverture had continued : such property, if it could have been attached during the coverture, does not become free from that obligation because it ceases to be separate property by the death of the husband or the wife.' But it must be remembered that in coming to a decision in favour of the plaintiff in that case the court was materially assisted by sect. 23 of the Act which would not apply where the death of the husband terminated the coverture.

But where the husband died before the wife, it has been decided that the creditor who obtains judgment against the widow in respect of a debt contracted during the marriage has no greater rights than he would have had if the husband had not died, and that he can only take in execution the free separate property of the wife possessed by her on the day of the death of the husband. In *Beckett v. Tasker*<sup>1</sup> the wife was possessed of certain real estate which by a post-nuptial settlement was limited to her for life 'for her separate use without power of anticipation.' On July 6, 1885, during the coverture she joined in making a joint and several promissory note. On October 13, 1885, the husband died. On August 10, 1886, judgment was signed against the wife in default of appearance to a claim in respect of the promissory note, and the plaintiff attempted to satisfy his claim out of the rents and profits of the real property which had been included in the settlement on the ground that the restraint against anticipation had been removed by the termination of the coverture. The Court refused the application on the ground that the married woman only contracted to bind the free separate property of which she was possessed at the date of the contract or which she afterwards acquired during the coverture. Wills J. said, 'I think that the words (of sect. 1, subs. 4) apply to married women and not to widows, and apply only to all separate property which the married woman and not the widow may thereafter acquire.' This interpretation of that subsection was confirmed in *Pelton v. Harrison*<sup>2</sup> by the Court of Appeal. The facts in the latter case could not be distinguished from those in *Beckett v. Tasker*<sup>1</sup>. Kay L.J. said that this subsection was passed in consequence of the decision in *Pike v. Fitzgibbon*<sup>3</sup>, and was only intended

<sup>1</sup> *Beckett v. Tasker* (1887), 19 Q. B. D. 7 ; Day and Wills JJ.

<sup>2</sup> *Pelton v. Harrison* (1891), 7 T. L. R. 686 ; Lopes and Kay L.JJ.

<sup>3</sup> *Pike v. Fitzgibbon* (1881), 17 Ch. D. 454.

to alter the law as there laid down. 'The Act of 1882 relates to married women and to married women only. It does not relate to a woman who is not actually under coverture.'

If these decisions be correct it is somewhat startling to find that if the widow marry again the free separate property that she may acquire during the continuation of her second coverture is liable to be taken in execution to satisfy the debts contracted during her first marriage, though this same property would not have been liable in this way if she had remained a widow. Yet it is so. In *Jay v. Robinson*<sup>1</sup>, which was decided before the decision of the Court of Appeal in *Pelton v. Harrison*<sup>2</sup>, a judgment for £180 and costs had been recovered against the defendant in August, 1886, when she was living with her first husband. In June, 1888, the defendant obtained a decree absolute for the dissolution of her marriage. In August, 1888, the defendant applied for an order varying the settlement made on her marriage. In June, 1889, the defendant married again, and by a settlement made in contemplation of the second marriage it was provided that such sum, as should in the result of the application to vary the previous settlement be directed to be paid to the defendant, should be vested in the trustees of the second settlement in trust to pay the income to the defendant for her separate use without power of anticipation. In July, 1889, an order was made on the application which directed that £5000 should be paid over to the trustees of the second settlement according to the terms thereof. The plaintiff in the original action applied for a receiver in respect of the £5000 in order to satisfy therefrom his judgment for £180 which he had recovered in August, 1886. The Court of Appeal reversed the decision of the Divisional Court and allowed the application. There were two questions in the case. (1) Whether the obligation of a married woman contracted during her former coverture was 'a debt contracted before marriage' within the meaning of sections 13 and 19 of the Act of 1882? If yes, then the second settlement was inoperative against the applicant. (2) Whether the words 'separate property which she may thereafter acquire' in sect. 1, subs. 4 includes separate property acquired during a second or other subsequent coverture? The Court of Appeal answered both these questions in favour of the creditor, and in *Pelton v. Harrison*<sup>2</sup> the argument mainly turned on the effect of this decision on the previous case, *Beckett v. Tasker*<sup>3</sup>. But it was held that the latter case was unshaken, though Kay L.J.

<sup>1</sup> *Jay v. Robinson* (1890), 25 Q. B. D. 467; Lord Esher M.R., Fry and Lopes L.JJ.

<sup>2</sup> *Pelton v. Harrison* (1891), 7 T. L. R. 686.

<sup>3</sup> *Beckett v. Tasker* (1887), 19 Q. B. D. 7.

allowed that the law as declared in these decisions was in a very anomalous position.

The effect of the cases which deals with the rights of the creditor after the termination of the coverture may be thus summed up.

(1) If the death of the wife terminate the coverture, her free separate property is as liable in the hands of her legal personal representatives as it would have been if she were still living.

(2) If the wife survive the termination of the coverture during which the debt was contracted.

(a) It is doubtful whether such free separate property as she possessed during the coverture would remain liable<sup>1</sup>.

(β) No subsequent addition to her property while she remained a widow would be liable to satisfy a debt contracted during her previous coverture or covertures.

(γ) If the widow remarry, then any free separate property of which she is possessed during her second or any subsequent coverture, whenever it was acquired, is liable to satisfy debts contracted during the previous marriage or marriages, and no settlement of such property by her is operative against a creditor in respect of such a debt.

The path of the creditor of a married woman is strewn with so many difficulties that it is some satisfaction to close this paper with the mention of a case which decided that the creditor who has proceeded to judgment may obtain a garnishee order and attach in execution sums payable by third parties to the married woman<sup>2</sup>.

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<sup>1</sup> In *Holly v. Hodgson* (1889), 24 Q. B. D. p. 108, there is an 'obiter dictum' by Lindley L.J. to the effect that the free separate property would remain liable.

<sup>2</sup> *Holly v. Hodgson* (1889), 24 Q. B. D. 103. Lord Esher M.R., Lindley and Lopes L.JJ.

THE 'QUADRIPARTITUS'<sup>1</sup>

TO all students of the law of the Norman period, or of earlier periods, this book will for a long time to come be, not merely important, but indispensable. All such students have probably heard that Dr. Liebermann—who first made himself known to Englishmen by a tract on the *Dialogus de Scaccario*, who has since done many a good turn for English history, who received the high honour of being chosen to edit among the *Monumenta Germaniae* the English chronicles bearing on German affairs, who shows some twice a year in the pages of *Quidde's Zeitschrift* that he has read every book, every pamphlet, every article, however ephemeral, that concerns medieval England—has for a long time past been engaged on a new edition of the Anglo-Saxon laws. In the course of that task he of course has had to face the ancient Latin translation of those laws—Schmid's '*Vetus Versio*'—a document of very great value to any one who would criticise or restore the English text, and one which is a primary authority for some dooms of which the English text is lost. And then also he has had to face a document less known to English readers, namely, what seems to be the preface of a Latin treatise on law. It ends with words which tell us that its first book will contain the English law done into Latin, that the second will give us certain writings necessary to our time, that the third is about legal procedure, and the fourth about theft. After arduous labour among the manuscripts, Dr. Liebermann has come to a theory of which we shall here give a very brief outline.

In the reign of Henry I some one set himself to translate the old dooms into Latin. To all seeming he was not an Englishman by race, and English was not his natural tongue; indeed he had to teach himself English, at least the English of the previous century, as he went on with his work. He was not a monk; he was a secular clerk, living in Wessex, and, it may well be, at Winchester. In some way or another he was closely connected with Archbishop Gerard of York. It is possible that he was employed as a clerk in the king's court or exchequer. We have more than one edition of his work; these can be distinguished from each other by the author's increasing

<sup>1</sup> *Quadrupartitus, Ein Englisches Rechtsbuch von 1114 . . . von F. Liebermann.* Halle, 1892. x and 168 pp.

mastery of the old English language, though to the end he was capable of making very bad mistakes. As the work grew he conceived the project of adding to the Latin version of the dooms three other books and of calling the whole result *Liber Quadripartitus*. The preface mentioned above was to have been the preface of this work. It was written in or about 1114. The second book—which was to contain *quaedam scripta temporis nostri necessaria*—was written between 1110 and 1118. This, after a new preface, gives the coronation charter of Henry I. Then apparently it intends to deal with the strife about the investitures; but it gradually degenerates first into a string of letters in many of which Archbishop Gerard is concerned, and then into a defence of the archbishop, who is already dead, but has been buried like a sorcerer outside the church. As to the third book we had at one time some hope that Dr. Liebermann was going to say that he had found it. There appeared to be some little reason for thinking that by way of a treatise on procedure the compiler of the Quadripartitus had borrowed a tract from some civilian, a tract which is known as ‘Ulpianus de edendo’ or ‘the Pseudo Ulpian.’ But Dr. Liebermann, after a little hesitation, now decides that this was not so. He does not allow us to indulge a belief that the third and fourth books may yet be discovered; he thinks that they were never written. (A whole book on theft from the first half of the twelfth century: what a treasure this would be!) He further thinks that the author did not know the *Leges Edwardi* or the bilingual *Leges Willelmi*. On the other hand, his work was largely used by the compiler of the *Leges Henrici*; indeed it was the one source from which that compiler obtained his knowledge of the Anglo-Saxon dooms. In some way or another these two men were closely related to each other. The two works come from the same period, the same district. The peculiar Latin of the one is just like the peculiar Latin of the other, and very curious Latin it is, very unlike what other people were writing. Dr. Liebermann does not say or suggest that these two writers were one man—but they belonged to one school.

What is now set before us is not a full text of the quadripartite, or rather bipartite, book, but first an exhaustive essay about it and secondly a skeleton of it. The text of the first book there was no need to print at present, for we have long known it as the *Vetus Versio*, and when Dr. Liebermann prints the Anglo-Saxon laws, he will put the Latin text of each law alongside the original English words. But a skeleton of the first book he has given us and it was desirable that he should do so, for the compiler of it did not arrange the laws in a chronological order, and, as Dr. Liebermann thinks, had a reason for adopting a different arrangement. If we

have Schmid's Gesetze at hand we can now easily restore this first book for ourselves, though no doubt we shall have a somewhat better and securer text of it by and by. As to the second book almost the whole of it is here printed, the whole, except the coronation charter which is in everybody's hand.

Now it cannot be said that Dr. Liebermann has here published many things that have never been published before—though now and then, as for instance in Henry's well-known ordinance about the local courts, he gives a new reading of great value—and the newest things that he publishes are not the most interesting to lawyers. But still his work is of first-rate importance. He has restored to us what we may believe to be our oldest legal text-book, and he has also gone far to unravel the tangled knot into which the various 'Leges' of the twelfth century have tied themselves. Of course we must not accept without consideration all the inferences that he has drawn about its author, the place, the time, the circumstances in which he wrote. Dr. Liebermann is an extremely keen investigator, nothing misses his eye, and perhaps from time to time he is inclined to see more than there really is in one or another of the hardly intelligible phrases in which this half-educated clerk tried to express such meaning as was compatible with his grandiloquence. At the moment time allows of but a hastily written word of welcome. Still, if hasty, our welcome must be warm; and Dr. Liebermann is so careful, so laborious, so frank, that if we say that in the main he has proved his case, we do not think that we shall have to retract the judgment. On every page we see proofs of marvellous industry and minute accuracy. None of our medieval lawyers, not even the lucky Britton, has had more care lavished upon him than has fallen to the lot of the nameless author of the *Quadripartitus*. We shall now look forward with the highest hopes to the forthcoming edition of the Anglo-Saxon laws, and Dr. Liebermann must remember that behind the laws there stand the 'land-books' crying aloud for yet another editor. An Englishman may be a little sorry to see, a little ashamed at seeing, that the honour of restoring this *Quadripartitus* to its proper place is won by a German; but that will not prevent him paying the honour where it is due, or adding Dr. Liebermann's name to the list which is headed by the names of Reinhold Schmid, Konrad Maurer, and Heinrich Brunner.

F. W. MAITLAND.

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## THE NEW GERMAN PATENT ACT<sup>1</sup>.

**B**EFORE 1877 no general system of patent law existed in Germany. In that year the first German Patent Act was passed, which has now been superseded by the Statute which came into force on the 1st of October, 1891. The system created fifteen years ago must, on the whole, have proved successful; for, although ample opportunities were given for expressions of opinion by those most competent to judge, the new Act—based on the report of a Commission of technical experts and on the subsequent recommendations of a select committee of the Reichstag—has not introduced any change of principle, and has left untouched the general scheme of the former law. The details have, however, been entirely remodelled, and a short account of the present state of the law may not be uninteresting even to those of our readers who are conversant with the Act of 1877. I propose to dwell more particularly on those features of the German Patent Law which exhibit special points of difference when compared with the corresponding parts of our own system.

These may be shortly enumerated as follows:—

- (1) the constitution and the functions of the Patent Office;
- (2) the limits within which inventions are patentable;
- (3) the rules by which the right to take out a patent is determined;
- (4) the official investigation as to whether a given invention may be the subject of a patent;
- (5) the procedure as to the revocation and cancellation of patents;
- (6) the remedies in the case of infringements;
- (7) the rules specially relating to patentees residing outside the German Empire;
- (8) the system of fees.

I. The Patent Office is an imperial department—independent of any other government department—and is composed of a President; of legal members (who must have the qualifications necessary for the higher administrative or judicial appointments); and of technical<sup>2</sup> members. It is subdivided into seven divisions, to which the

<sup>1</sup> Seligsohn, *Patentgesetz und Gesetz betreffend den Schutz von Gebrauchsmustern*: Berlin, 1892. Kohler, *Patentrecht*: Mannheim, 1877.

<sup>2</sup> The word 'technical' is here used in the sense in which we use it when speaking of technical education.

following business is respectively assigned; to four of them: applications for the grant of patents; to one: applications for the revocation or cancellation of patents; and to the remaining two: appeals from orders made by the other divisions. Two technical members and one legal member form a quorum, when an application for the grant of a patent is finally determined on; and in the Divisions which hear applications for revocation or cancellation or appeals from the other Divisions three technical and two legal members must be present when a final order is made. The register of patents and the publications relating to patents are also under the control of the Patent Office.

II. The limits within which inventions may be patented in Germany are much narrower than those established by English Patent Law. As is the case in English law, novelty and fitness for industrial purposes are required, and articles intended to be used for unlawful or immoral purposes are excluded. But certain classes of inventions which would be patentable according to English law cannot be the subjects of German Patents.

These are inventions of:

- (1) articles of food and physical enjoyment<sup>1</sup>;
- (2) articles intended to be used for medical purposes;
- (3) substances produced by chemical means.

The definition of 'novelty' given by sec. 2 of the German Statute is both narrower and wider than the construction which the same term has received in English Courts. According to German law the element of novelty is absent, if an invention is already known by a description contained in a printed publication not more than a hundred years old at the time of application, or by public use within the German Empire. The description must, for the purposes of the rule, be sufficiently explicit, or the use sufficiently public to enable an experienced person perusing it or having acquaintance with it to work the invention himself; and the publication of an invention by any other means except printing (e.g. by description in public lectures) or public use outside Germany does not in itself take away its patentable character. On the other hand, it is not necessary for the purposes of the rule that a printed publication containing a description of the invention should be known or accessible in Germany. If the description is sufficient and if the date of the publication is within the limit, the invention is (except in the case to which we shall presently refer) not patentable.

<sup>1</sup> The German word is 'Genussmittel' (literally = Means of enjoyment). Cigars, Perfumes, &c., are specially aimed at, but it has been held that fuel is not included. Kohler, 'Patentrecht,' p. 72, defines 'Genussmittel' as 'articles the essential purpose of which is to create a pleasurable feeling to the sense of taste or smell.'



The Act of 1891 has created an exception in favour of foreign patentees. A foreign patentee is not to be incapacitated from obtaining a patent for an invention by reason of such invention having been described in a foreign patent office publication—provided that such publication was not issued more than three months prior to the date of the application, and provided also that the foreign state in which the patent was taken out grants similar privileges with reference to the German official publications.

The fitness for industrial uses corresponds to the 'usefulness' required by English law.

The exception of inventions to be used for unlawful or immoral purposes requires no further explanation. No one could reasonably object to such a restriction, but the question arises whether it is wise to leave it to a Government Department to decide what purposes are immoral. It is not difficult to imagine purposes which persons in power might consider dangerous from a political point of view or otherwise objectionable, and which therefore they might be tempted to class as immoral. The decision of such a matter is in much better hands if left to the Courts of Law. The exception of articles of food, &c., and of articles to be used for medical purposes, was intended to prevent inventors from trading on the necessities of the public and to discourage quackery. It may, however, have the effect of hindering useful inventions and of protecting foreign quacks at the expense of their German brethren.

The abuse of patent rights relating to necessary articles could be sufficiently checked by the application of the provision that a patent may after three years be cancelled if it appears necessary in the public interest, that others should use the invention and the patentee refuses to grant a license on reasonable terms (s. 11 (2)).

The exclusion of substances produced by chemical means was, in the official introduction to the bill of 1877, justified on the following grounds (see Kohler, p. 74): (1) the nature of the subject matter (*Natur der Sache*), (2) the interest of manufacturers to whom the unrestricted production of such substances is advantageous. The first reason begs the principle and the second one proves too much, as it might be used as an argument against all patents.

It should be pointed out, that a *process* for the production of an article not patentable in itself may be the subject of a patent, and that, in civil actions for infringement of a patent relating to a process by which a new substance is produced, it is for the *Defendant* to prove that he has used a process differing from the one to which the patent applies (sec. 35). An article though not patentable in itself may therefore be protected so far at least, that its manufacture or

sale by an unauthorised person creates a good *prima facie* cause of action.

III. The fiction of the 'first and true inventor' has not penetrated into German law, the general rule being that the first applicant is entitled to the grant of a patent. This rule is, however, subject to the following restriction. If the applicant has based his claim on a specification derived from the descriptions, drawings, models, &c., of another person, or from a process applied by that other person, without his consent, the patent will be refused, if such other person (who need not be the inventor) files an objection<sup>1</sup>.

There is also a reservation in favour of any person who, before the application was made, had—within the German Empire—used the invention to which it relates or had made the necessary preparations for bringing it into use. He is not entitled to object to the grant, but he may, notwithstanding the patent, use the invention for the purposes of his business, and the right to such use may be acquired by or devolve on any person to whom such business passes by purchase or descent (sec. 5).

IV. The incidents of the inquiry which precedes the grant of a patent have been considerably modified by the Act of 1891. The inquiry is now divided into three—and in case of an appeal—into four stages.

In the first instance a member of one of the Divisions to which applications for patents have been assigned (see above) has to examine—(a) whether the *application* complies with the statutory requirements;

(which are :—

- (1) an exact description of the subject matter of the intended patent;
  - (2) a specification sufficiently explicit to enable any experienced person to work the invention himself;
  - (3) a distinct statement of the claim (this last requirement has been added by the Act of 1891);
  - (4) drawings, models, or patterns in so far as they are necessary).
- (b) whether the *invention* is of a patentable nature, and whether or not it is the subject of a previously granted patent or of a previous application (sec. 21).

If the examining member is satisfied on both points, the application is at once referred to one of the Divisions to which applications for patents are assigned. If he is not satisfied on either or on both points, he must state his grounds of objection, and order the applicant within a given time to amend the application or to answer the

<sup>1</sup> The grant of the patent does not take away his rights; he may obtain an order of revocation (see below).

objections. Non-compliance with the order is deemed a withdrawal of the application ; but, if the amended application or the answer to the objections is filed in proper time, the matter is referred to one of the above-mentioned Divisions as in the first-mentioned case.

The second stage is the preliminary inquiry before the Division to which the matter has thus been referred. If the Division is of opinion that the application ought to be rejected on grounds other than those stated in the first examiner's objections, an opportunity must be given to the applicant to state his reasons for disagreeing with the new grounds of objection (ss. 21 & 22).

If the Division accepts the application the inquiry enters into its third stage. The particulars of the invention are then advertised in the Imperial Gazette, and from that time the invention enjoys provisional protection. The specification is deposited at the Patent Office and (subject to certain exceptions) open to the inspection of the public. Within a period of two months from the date of the advertisement in the Imperial Gazette *any person* may file an objection, on the ground of the invention not being of a patentable nature or of its having been forestalled by a prior patent or a prior application, and any person whose description, drawings, &c., have been used in the manner referred to above is similarly entitled to oppose the grant (sec. 24). If after the expiration of the two months no objection has been filed, or if it is held that the objections are invalid, an order is made directing the patent to be granted (sec. 24). The order must be served on all interested parties (sec. 15), and the objector may within a month after service give notice of appeal<sup>1</sup> (sec. 26). If no notice of appeal is given within that time, or if the appeal is dismissed, the grant of the patent is published in the Official Gazette, and a document certifying the grant is issued to the applicant.

V. The grant of a German patent does not conclusively establish its validity, but it creates rights much less easily disturbed than those derived from an English grant, and the presence of some of the conditions on which the validity depends is absolutely established, as soon as the application has been finally approved. After that time the validity of the patent can no longer be disputed on the ground of any defect or irregularity in the specification or of any other fault or incompleteness in the application or in any of the documents accompanying it. Moreover, applications for the revocation of a patent on the ground of the invention not being of a patentable nature, are not permissible after the expiration of a period of five years from the date of the patent, and it should also be borne

<sup>1</sup> There is also an appeal allowed against an order refusing the application ; if such an appeal is successful the proceedings of the second stage are re-opened.

in mind that owing to the elaborate character and the wide range of the inquiries preceding the grant, there must be a much stronger presumption of the validity of a patent, than in countries where the first examination is of a more limited character.

An application for the revocation of a German patent may be filed by the same persons and on the same grounds as an objection to the original grant (ss. 10, 24, 28).

The effect of a revocation is to make the patent void *ab initio*. In this respect it differs from the *cancellation* of a patent which only operates from its date. Any person may, after a period of three years from the date of a patent, apply for its cancellation on the following grounds:—

- (1) The omission of the patentee to use proper efforts for the purpose of working the invention on a reasonable scale within the German Empire.
- (2) The omission of the patentee to grant licences on reasonable terms if it seems necessary in the public interest that others should work the invention (ss. 11 & 28).

Applications coming under the second head seem to be very rare; the effect of the provision is practically the same as if the patent office had been empowered to order compulsory licences.

An appeal lies to the Supreme Imperial Court at Leipzig from orders dismissing or allowing applications for revocation or cancellation.

VI. The following remedies are available when a German patent has been infringed:—

- (1) *Under general rules of law* a patentee may sue for a restraining order (Orders in the nature of interlocutory injunctions will in such cases be made on similar principles as in English Courts).
- (2) *Under the Patent Act* a patentee may—
  - (a) sue for damages if the Defendant has *knowingly or recklessly* caused the infringement;
  - (b) institute criminal proceedings if the Defendant has *knowingly* caused the infringement. The maximum punishment in such a case is a fine of £250 or one year's imprisonment;
  - (c) if criminal proceedings result in a conviction, the patentee may claim a penalty not exceeding £500 in lieu of damages.

These proceedings are taken in the ordinary Courts, which thus may have to decide on the validity of the patent alleged to have been infringed. It is however usual, whenever that question is raised, to order the Defendant within a given time to apply to the Patent Office for an order of revocation, and the proceedings are then suspended until the time has expired or until the Patent Office has

given its decision. It may therefore be said that, virtually, all questions concerning the validity of a patent are in the first instance tried by the Patent Office.

VII. Any person residing outside the German Empire—whether a German subject or not—is entitled to take out a patent in Germany, provided that he appoints an agent residing within the German Empire, whose name must be entered on the register, and who must have full powers to act for him—

(1) in any proceedings taken in pursuance of the Patent Act ;

(2) in any action relating to the patent (s. 12 (1)).

The Imperial Chancellor, with the consent of the Federal Council, may order that the subjects of any particular state shall not be entitled to take out a patent in Germany if in such state patents are not granted to Germans (p. 12 (2)), but no such order appears to have been issued so far.

A person residing outside the German Empire may file an objection to the grant of a patent, or take proceedings for the revocation or cancellation of a patent, without appointing an agent in the German Empire (Seligsohn, pp. 195 & 207), subject, however, to the right of the patentee, in the case of an application for revocation or cancellation to apply for security for his costs (s. 28 (5)).

VIII. The German system of fees is based on the principle that a patent is more likely to be profitable at a late stage of its existence than in the beginning. There is, therefore, a progressive scale of fees, 30 shillings being payable for the first, 50 shillings for the second, and 100 shillings for the third year, 50 shillings more being added in each subsequent year. The duration of the patent being fifteen years, the sum total amounts to £264 (s. 8).

The patent is not granted unless the first fee is paid within two months from the date of the advertisement describing the particulars of the invention (see above); in subsequent years the fee may be paid within six weeks from the beginning of each year, and (with the addition of a fine of 10 shillings) within a further period of six weeks. If the fee remains unpaid for twelve weeks after the beginning of any year, the patent will lapse (ss. 8 & 24).

The Patent Office may allow a patentee, producing evidence of poverty, to postpone the payment of the first two fees which in such a case must be paid together with the fee due for the third year, if the patent is to continue; but if the patent is allowed to lapse or otherwise ceases to exist before the end of the third year, the first two fees may be remitted altogether.

We have not nearly exhausted the points as to which a comparison between German and English Patent Law might prove interesting, but sufficient has been said to show in what the essential difference

consists. The leading idea of the German system is that patent rights should above all be governed by considerations of public policy. It is for the interest of the public welfare that useful inventions should be worked with a prospect of profit—therefore the first applicant shall have a patent<sup>1</sup>. A patentee has more inducement to work on an appropriate scale, if his patent is fairly safe; on the other hand, the general public should not be restricted in the production of useful articles unless good cause for the grant of a monopoly can be shown—hence the exhaustive character of the preliminary inquiry. As questions in which considerations of public policy are involved are more easily decided by an authority not tied down to strict rules of procedure nor confined to the material brought before them by the parties concerned—the validity of patents is mainly left to the determination of the Patent Office, that office being an administrative and not merely a controlling authority.

Whether the system will ultimately accomplish its ends is a question for the solution of which longer experience will be required, but there can be no doubt that much may be said in its favour, and that it opens subjects of inquiry interesting to the student of social and economical facts no less than to the lawyer.

ERNEST SCHUSTER.

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<sup>1</sup> The principle is based on the same considerations as the rule established in many continental places, and by the custom of 'tin-bounding' in the stannaries in England, according to which any adventurer may open a mine wherever the owner of the surface neglects to do so.

## REVIEWS AND NOTICES.

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**Short notices do not necessarily exclude fuller review hereafter.**

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Why do joiners and cabinet-makers so often make shelves just not high enough to take a full-sized octavo ?

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*The Elements of Politics.* By HENRY SIDGWICK. London: Macmillan & Co. 1891. 8vo. xxxii and 632 pp. (14s. nett.)

THE greater part of this book is devoted to matters which do not fall within the province of this REVIEW; but law is in fact a branch of politics, and Mr. Sidgwick's chapters on property, contract, and other legal topics may be read with profit even by professed jurists. At the outset of his inquiry, he examines the conception of law as the command of a sovereign authority, and shows once more that Austin's theory cannot be made to fit all the facts. In working out his doctrine of indivisible sovereignty, Austin went so far as to say that a government which is legally precluded from defining and extending its own powers is not truly sovereign; in the United States, for example, sovereignty resides, not in the federal government nor in the governments of the States, but in the combination of bodies having authority to alter the constitution. Applying this doctrine to the Belgian constitution, which has not been altered for fifty years, Mr. Sidgwick remarks, 'Surely it strains language to say that Belgians habitually obey a combination of bodies that has never been summoned to exercise its functions for fifty years.'

The general principles to which, in Mr. Sidgwick's opinion, legislation should conform are in substance the same as the principles of Bentham. Property, for example, is justified on utilitarian and individualistic principles: it is expedient that the individual should be allowed to appropriate useful things, provided that other men's opportunities of obtaining similar utilities are not materially diminished. I am disposed to think that this part of Mr. Sidgwick's theory would have been strengthened if he had given more importance to the historical origins of property. There is, in all systems of law, a merely traditional element. Land and other useful things became private property by a process of dispute and compromise; the distribution of property was effected by the actual exercise of power; and

the law, for the sake of social order, protects long-established rights, even where they cannot be shown to conform to abstract notions of justice and expediency. Society, Mr. Sidgwick suggests, has allowed individuals to appropriate land without making compensation for the opportunities of which 'individuals now landless' are deprived by such appropriation. But if land has been bought and paid for during many generations on the understanding that no such compensation is to be exacted, the legislator will have some difficulty in exacting it without social disturbance. In discussing the law of contract, the abstract method is more applicable and history counts for less; here Mr. Sidgwick is more at home. He puts us out, here and there, by using familiar terms of art in unfamiliar senses, but he explains strongly and clearly the reasons for which contracts are enforced, and the limits within which individuals may be allowed to make law for themselves by agreement. We find also much that is interesting and sound in Mr. Sidgwick's chapters on inheritance, on law and morality, and on international law. His treatment of case law in the chapter on the Judiciary seems less happy, and we can by no means approve his suggestion that the legislature should prevent the judges from making law, 'by declaring it the duty of a judge to give to the words of the law what he thinks their true meaning, without regard to previous decisions.' Such a rule would imply that the whole law has been codified, for where principles of common law or equity are in question, there are no authoritative 'words of the law' to be interpreted. If our law ever is codified, the decisions of the judges would be the best commentary on the code: but if previous decisions are to be disregarded, the commentary will lack consistency, and a new element of uncertainty and risk will be introduced into the law. This, however, is a subject on which the profession and the public will always be more or less at variance. It is natural that laymen should wish to see the law stated in the form of a well-arranged code; it is equally natural that English lawyers should wish to retain for our courts that freedom in expounding and applying the law which they now enjoy, and at the same time to maintain the respect for authority which makes our case law a consistent and continuously developing system.

T. RALEIGH.

*Year Books of the Reign of King Edward the Third: Year XV.* Edited and translated by LUKE OWEN PIKE (Rolls Series). London: 1891. lvii and 528 pp.

EVERY volume that Mr. Pike publishes is better than the last. He is always finding out some new device for making these medieval reports intelligible to modern readers, and seems to be fast approaching that limit beyond which further improvement is impossible. This time he has to our mind many interesting cases in his volume. We have noted a few:—a curious record about the customary 'assize of fresh force' as administered in the borough court of Oxford so as to protect a peaceful seisin of forty weeks (p. 478):—'John de Clare rendered the land into the hand of the king to the use of our ancestor' (p. 80), this is noticeable when it comes from 1341:—'Note that where by an obligation one was bound in 40 marks, the plaintiff was bound by an acquittance which purported that he received 10 marks in full satisfaction of 40 marks' (p. 84):—'Vigilantibus et non dormientibus, &c.' says counsel (p. 238):—'Ex nudo pacto non oritur actio' says Basset J. (p. 136), but he is not thinking of consideration or quid pro quo:—'In the case of John Benstide, the widow was endowed at the age of nine years and a half' (p. 160):—In spite of *Quia emptores* the lord of the



honour of Gloucester insists that every purchaser who buys land held of that honour must pay an arbitrary fine (pp. 98, 102)—this customary or prescriptive right was alleged even in the fifteenth century (Y. B. 14 Hen. IV. f. 2, Mich. pl. 6). Another case (p. 155) bears on the vexed question about the power of a tenant in chief of the crown to alienate his land. There are cases in other Year Books which seem to show that in the opinion of the lawyers of Edward III's reign, something happened in the twentieth year of Henry III's reign which restricted a power of alienation formerly enjoyed by the tenants in chief. Coke (2nd Inst. 66) attempts to explain this by saying that Magna Carta was confirmed, not indeed in the twentieth, but in the twenty-first year of Henry III, and that thus some new validity was given to the restrictive clause which first appeared in the charter of 1217. But Mr. Pike has a case in which a pleader seems to lay stress on an allegation that a feoffment by a tenant in chief was made before the thirtieth, not the twentieth, year of Henry III. This may at first sight seem to confound confusion, but at least it adds one new argument to the many which might be urged against Coke's explanation.

However, this volume is likely to be remembered as 'the merchet volume,' for Mr. Pike has devoted the greater part of his introduction to a careful and scientific examination of the mysterious payment about which so much rubbish has been written. The chief novelty that we find is a suggestion about the origin of the word *merchet*. May not its root be the English *mearc*, *mark*, a boundary? Sometimes the payment is only exacted when a girl or boy is married outside the manor or vill; sometimes the payment is higher in this case than in the case of what we may conveniently call 'endogamy.' May it not be then that the payment is originally one which is only made when marriage takes place across the mark? This is a suggestion which should certainly be followed up, for as Mr. Pike well shows, there are great difficulties before the theory that the word has a Celtic root. All that he says about this matter is cautiously and judiciously said, and we cannot doubt that it will smooth the way for further investigations.

We hold a half promise that Mr. Pike will deal with the case of Archbishop Stratford. We sincerely hope that he will do this. If he is on the outlook for the themes of future introductions, we venture to ask for an essay on the relation between the oral debates reported in the Year Books and the enrolled pleadings. Is there in the fourteenth century any interchange of written pleadings between the litigants? At present it seems to us that there is none. Occasionally counsel seem to be pleading tentatively, they try a plea and are driven to abandon it, and the abandoned plea will find no place on the record. But we should much like to know how all this is, and some day when Mr. Pike has nothing better to do, he must tell us all about it. Probably during the last two centuries no one but he has compared the reports with the records in case after case and term after term, or has had half as good a right to speak of these things as that which he has acquired by his diligence.

F. W. M.

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*Naval Warfare of the Future: a Consideration of the Declaration of Paris, 1856; its obligation and its operation upon Maritime Belligerents.* By THOMAS WARAKER. London: Swan Sonnenschein & Co. 1892. 8vo. x and 213 pp.

By her adhesion to the Declaration of Paris in 1856 England accepted three principles of maritime warfare, which may be thus stated:—(1) that

privateering should be abolished, (2) that a neutral flag should cover the enemy's goods, (3) that the enemy's flag should cover neutral goods, save contraband of war in the two latter cases. Mr. Waraker denounces England's adhesion to the Declaration on legal, military, and national grounds. On the assumption that her representatives acted *intra vires*, and did in fact bind their country (which he doubts), he holds it to be (1) 'a detrimental treaty which should not be observed in fact' (p. 36), (2) an attempt to secure 'a military war and a commercial peace,' which Lord Stowell (p. 48) declared to be 'a thing not yet seen in the world,' (3) as a gratuitous surrender of England's strongest weapon at sea—the practice of capturing the enemy's goods in whatever bottoms they may be found. Now it is remarkable that the author, a Cambridge resident, makes no allusion to the strong contrary opinion of the late Master of his own College, Sir Henry Maine. That great authority not only approves of the Declaration of Paris, but holds that England should accept the proposal of the United States, which did not adhere to the Declaration, that all private property at sea should be exempted from capture, if privateering were abolished (International Law, pp. 119 sqq.). England is, he says, practically the carrier of the world; she is, in these days of iron ships, also the greatest constructor; her population lives mainly on imported seaborne food, and pays for it by exported seaborne manufactures. Hence any hostile interference with the carrying trade would hit her harder than any other power. Moreover 'in any new war, an attempt to enforce the parts of law unfavourable to neutrals, will probably turn the neutral trading community into a belligerent' (ibid. p. 117).

Mr. Waraker's neglect to deal with Sir H. Maine's opinion can only be accounted for (excluding the almost incredible hypothesis of pure ignorance) on the assumption that he holds it to belong rather to the regions of abstract law than to those of practical politics. His disbelief in the restraining power of international law is indeed abundantly shown throughout the book. Whereas Maine's statement concerning the American proposal is that it 'might well be made by a very strong friend of Great Britain,'—our author holds that, granting that England would gain by the exemption of private property from capture, that very fact would lead her enemies either to refuse the exemption or to disregard it in war, though they might possibly have assented to it in time of peace.

H. A. P.

[*Fides est servanda* is the really conclusive answer to all speculations of this kind.—ED.]

*The Principles of the Law of Torts.* By L. C. INNES, sometime one of the Judges of Her Majesty's High Court of Judicature, Madras. London: Stevens & Sons, Lim. 1891. 8vo. xxxii and 308 pp. (10s. 6d.)

MR. INNES points out that a tort is produced by conduct working harm, and he accordingly bases the fundamental division of his work upon the distinction between (1) the elements of conduct and its operation, and (2) the classes of harm in which the operation of conduct results.

Under the heading Conduct are properly ranged the subjects of negligence, agency in torts, deceit and fraud, and the use of dangerous agencies, while the second division of the work deals with particular classes of rights *in rem* and their violation. This method of arrangement is logical and scientific and enables the author to adopt the clear analytical distinctions which are summarised on p. xxxii. The practitioner may at first sight resent the novel guise in which the subject is presented, and will turn in vain to the

index and table of contents for the familiar words 'trespass' and 'trover.' Still among the concrete examples which follow and illustrate the author's abstract propositions we find most of the well-known authorities collected together and brought up to date. The recent limitation of the maxim *Volenti non fit injuria* by the decision of the House of Lords in *Smith v. Baker*, '91, A. C. 325 is noted in the preface, and the alteration effected in the law by the Slander of Women Act 1891 is incorporated in the text.

The statements as to negligent misrepresentation on pp. 45 and 53 will require modification now that the Court of Appeal has in *Low v. Bouverie*, '91, 3 Ch. 82 declared that *Slim v. Croucher* (1 D. F. and J. 518) has been overruled by *Peek v. Derry* (14 App. Ca. 337).

In the note at the foot of p. 138 on the Admiralty rule for dividing the damage caused by the simultaneous negligence of two ships, the words 'in such proportion as can be ascertained' are misleading.

Some references too require verification; e.g. *Bonner v. G. W. Ry. Co.* occurs not in 27 Ch. D. 87 but in 24 Ch. D. 1. On the whole, however, we have found the work accurate and clear, and believe that it will be an useful addition to any law library. It is excellently printed and forms a handsome volume. S. H. L.

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*A Treatise on the Power and Duty of an Arbitrator, and the Law of Submissions and Awards.* By FRANCIS RUSSELL. Seventh Edition, by the Author and HERBERT RUSSELL. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1891. La. 8vo. lxvi and 958 pp. (24s. nett.)

It would be needless to do more than note the appearance of a new edition of Russell on Arbitrations, were it not that this particular edition appears under special circumstances. It is the first published since the death of Mr. Francis Russell, the original author of the book, who was however able to prepare the whole book for the press before his death in May last. In his son, Mr. Herbert Russell, the family traditions of editing have been well maintained. This edition is also the first since the passing of the Arbitration Act, 1889, which codified, and to some extent amended, the statute law on the subject. It was a matter of regret that the whole law of arbitration was not crystallised in a statutory form, and a draft bill was indeed prepared by Master Macdonell for that purpose, but parliamentary exigencies prevented this, as well as many other unostentatious but very desirable reforms. The bill as it became law made certain amendments, in some cases of a very sweeping character, as when by a short clause (§ 25), and a short provision in a schedule, it gave arbitrators, under submissions made before its passing, power to deal with costs, though in many cases that power had been intentionally omitted by the parties from their contract, in the belief that a person who must in every case bear his own costs would only make claims in substantial cases. The act however failed to rectify some glaring omissions, and left a large body of common law rules still uncoded. Its provisions, such as they are, appear to have been carefully considered by the authors, and the necessary alterations made in the text.

But the subject of arbitrations has a wider interest at the present time. The Courts have resumed sittings in London at the Guildhall for the avowed purpose of attracting back to the tribunals the commercial disputes that have been entrusted to the decision of lay arbitrators; and the Lord Chief Justice of England has welcomed the Lord Mayor of the City of London with an eulogy on the wisdom of men of business who prefer the

prompt and cheap decisions of lay arbitrators to the expense, delay, and uncertainty of the tribunals presided over by the Lord Chief Justice and his fellow judges of the Queen's Bench Division. Of the increase of arbitrations there can be no doubt; the opposed motion list is full of motions:—'In the Matter of an Arbitration,' and every lawyer in commercial practice can bear witness to the frequency of this method of settling disputes, not merely in cases of intricacy and account, but also in commercial cases involving short points of commercial law or usage. The delay of the Courts, the uncertainty in time, the burden of costs of many interlocutory proceedings, and the extent of judicial discretion as to their incidence, the difficulty of getting busy witnesses to the new Law Courts, have all frightened away the commercial litigant, who however still disputes, and still must settle his disputes.

There has been wailing in the profession over the recent sittings at the Guildhall, not without some cause. A very remarkable list of libels, accident cases, malicious prosecutions, and disputes as to the merits of cures was provided for the consideration of the City juries, and, as the Lord Chancellor has remarked, all parts of the country contributed to swell it. Lord Halsbury however did not point out, though he must be aware, that the difficulty of properly trying civil cases in assizes under the one-judge system is a powerful factor in bringing cases up to London, while the first Guildhall list was hardly a fair one to criticise, as many of its cases were entered before it was realised that sittings in London would be at the Guildhall. The next sittings will probably show a very different class of list, and if judges with special commercial knowledge are sent down to the Guildhall and proper provisions made to exclude cases of country origin, there is reason to hope that commercial litigation may welcome tribunals at the doors of suitors.

The confidence of laymen in the tribunals in the Strand is not however likely to be increased till some effective control is exercised over the sittings of the Queen's Bench Division by some person in authority. Any one who will compare the weekly announcements of arrangements for the ensuing week with the actual performances of the Courts, will understand the disgust of suitors, and the despair of solicitors and the bar. If there is no power to control the notorious unpunctuality and somnolence of some judges, and the frequent holidays of others, one should be created as soon as possible. The spectacle of a judge coming into Court twenty minutes late, and immediately rebuking some unfortunate person for wasting the public time, is not calculated to impress the laymen with respect for legal tribunals: and there is at present no lack of reasons why arbitrations should increase; and Russell on Arbitrations continue, as it is now, almost a necessity to every practising lawyer.

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*Forms of Judgments and Orders in the High Court of Justice and Court of Appeal, having especial reference to the Chancery Division, with practical notes.* By the late Hon. Sir H. W. SETON. Fifth Edition, by CECIL C. M. DALE and W. CLOWES. In two volumes. Vol. I. London: Stevens & Sons, Lim. 1891. La. 8vo. cvi and 916 pp. (40s.)

THE appearance of this portly volume will be, and is, heartily welcomed in Lincoln's Inn. It is now fourteen years since the fourth edition began, and twelve years since it ended, its public entry; the fourth edition in its turn was fifteen years later than the third. There is no book which is

more useful to lawyers who ply their trade north of Fleet Street. To have the new edition is to be absolved for a short time from the *limas labor* of 'noting up' and to feel sure that all the decisions which have been given, all the rules which have been passed, and all the sections which have received the Royal Assent, are duly incorporated in the places appropriate to them. For of this one may feel certain when the accuracy and industry of Mr. Dale and Mr. Clowes have been brought to bear upon the task. Great help has also been given in a great work by men of long experience in Chancery. So that no pains have been spared to make 'Seton' what it is, an indispensable piece of furniture for the table of every Chancery practitioner. The index which the editors have thoughtfully given at the end of the first volume is well up to the standard of 'Seton' indices, and there is no higher praise than this. Another thing which may be found at its best in 'Seton,' and not—so far at least as we know—elsewhere, is the list of Equity Judges from 1660 downwards, with a table showing the succession of judges in each Court. Naturally there are many things which we essay to find in this first volume which are not to be found there; but we have every confidence that they will come to hand in the second volume. That such second volume will be forthcoming ere long is—we make bold to say—the fervent desire of all men whose business lies in Chancery.

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*Essays in Jurisprudence and Legal History.* By JOHN W. SALMOND.  
London: Stevens & Haynes. 1891. 8vo. xi and 236 pp.

MR. SALMOND, part of whose work has already appeared in these pages, is a barrister of the Supreme Court of New Zealand. Historical and philosophical study of the law is not yet very common at the Antipodes, though we must not forget the highly meritorious work of the late Mr. Hearn; nor, indeed, is it too common here. We should therefore be glad to welcome Mr. Salmond's book as a hopeful sign even if it were less good than it is. But it is quite good enough to stand on its own merits. Perhaps the best and most interesting of the essays is 'The History of the Law of Evidence,' and the reader need not take alarm at an unlucky misprint in the very first lines which does its worst to make nonsense of a sentence. 'One fact is evidence of another when it in any degree renders the evidence [read *existence*] of that other probable.' Mr. Salmond has well brought out how modern a thing it is for courts of justice to weigh evidence at all. The procedure and rules of archaic laws are anxiously directed, one may say, to the avoidance of any such responsibility. And it is historically true that the conclusiveness of a jury's verdict in matter of fact (however much encroached upon by motions for new trials) is a relic of the old system.

In discussing the History of the Law of Contract, Mr. Salmond valiantly maintains that theory of the origin of Consideration which we cannot help thinking the least plausible of all, namely that it is derived from the *causa* of modern civil law through the Court of Chancery. We do not think Mr. Salmond has given due weight to Prof. Ames's recent work in the *Harvard Law Review*; and his own work would have been all the better if he had studied Mr. Langdell's 'Summary,' and used, for the Continental history, Seuffert's most interesting essay 'Zur Geschichte der obligatorischen Verträge.' We must observe that it is not workmanlike to refer to the Anglo-Saxon laws merely by the volume and page of Thorpe's edition: Schmid's is probably, on the whole, more used by students. Once or twice Mr. Salmond, with superfluous zeal, controverts utterances of authors who

have really said nothing inconsistent with his position. But, in short, the defects are such as time and experience will mend, and the merits such as they will improve.

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*A Compendium of the Law of Property in Land.* By WILLIAM DOUGLAS EDWARDS. Second Edition. London: Stevens & Haynes. 1891. 8vo. lxii and 558 pp.

WE formed a very favourable opinion of the first edition of this little book, and our opinion is confirmed by the perusal of the second edition. The author has the merit of being a sound lawyer, a merit perhaps not always possessed by the authors of legal text-books for students. He writes in good English, and generally speaking states the law correctly. We are glad to hear of the rapid sale of the book, as we feel certain that no student will regret having studied it.

There are some minor points to which we take exception. The author's fondness for referring to Blackstone might mislead a student to suppose that Blackstone is an authority, instead of being merely a most charming expositor of the law.

Our author says at p. 22:—'The possession of land according to feudal principles by the tenant of an estate in fee simple in tail or for life holding by freehold tenure, is technically termed seisin.' Again, at p. 44, he speaks of the 'seisin or feudal possession.' Why *feudal* possession? Professor Maitland has abundantly shown that all through the middle ages 'seisin' was applied to property of every nature. And the 'principles' of seisin are not feudal, but much older.

In some cases the author mentions or discusses questions that we should have considered too recondite for students, such as at p. 48, the question whether a fee simple determinable at common law could be created after the statute of *Quia Emptores*, and at p. 16, the question whether leaseholds for years are tenements. In each case the author states what he believes to be the law without giving a hint that the question is one to which different answers have been given by high authorities. See as to the first question L. Q. R. ii. 394, iii. 399, 403; and as to the second question, v. 326, vi. 69.

But on the whole we may congratulate the author both on the success of his book, and on the careful revision of this edition. He has now adopted a manner of printing which will greatly facilitate the use of the book by students. He introduces the more important paragraphs by head notes in bold black type, and the less important by head notes in italics. This is perhaps a small matter, but, speaking not without experience, we are certain that all mechanical aids to the use of books on difficult subjects are of very great importance. There is a good index, and students will find the table of abbreviations extremely useful.

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*The History of the Law of Prescription in England. Being the Yorke Prize Essay of the University of Cambridge for 1890.* By THOMAS ARNOLD HERBERT. London: C. J. Clay & Sons. 1891. 8vo. xxiv and 210 pp.

A REVIEWER is generally in some difficulty when he has to review a University Prize Essay: on the one hand he wishes to deal tenderly with the writings of a young lawyer, and on the other hand he may feel it unfair to

his readers to recommend a work which, though full of promise, is immature. Happily in the present case the difficulty does not exist, as after a somewhat careful perusal we can safely recommend this book both to the student and the practitioner. The author has adopted the commendable practice of seeking the fountains of the law as contained in the Year Books and the Old Abridgements, and he has even searched the Rot. Parl. It follows that he has collected a great deal of curious learning, which is not to our knowledge contained in any one book. See for example the amusing account of the law as to Swans, at p. 107 *et seq.*, the account of the law as to forests and free-warren at p. 96 *et seq.* The discussion in chapter vii. as to prescription against definite rules of Common Law and against Statutes is one of great interest. There are many questions in the history of English law that remain to be solved. Mr. Herbert has proved himself well qualified to write on such subjects, and we venture to hope that he will continue to do so.

We have also received—

*Condition juridique des enfants naturels.* Par AUGÉE-DORLHAC. Paris: Arthur Rousseau. 1891.—The position of illegitimate children is a subject which has been much discussed of late in France. The Civil Code does not permit proof of the paternity of such children where not acknowledged by their father, and the more immediate object of this book is to show in what respects French legislation on the subject requires amendment. France, it is true, grants restricted rights of inheritance to illegitimate children who are recognised by their father or mother, or who prove their filiation as regards the mother, and recognises legitimization by subsequent marriage between the parents, subject to a declaration of the intention to this effect being made on the occasion of or before the marriage, a qualification not generally known. In these respects French law is more beneficent to the illegitimate than English law. Nevertheless in practice the want of a law for the filiation of young children is more felt in France than an alteration of the law on the subject seems to be felt in England.

M. Augée-Dorlhac's comparisons drawn from foreign countries are very instructive, though as regards England he shows perhaps too much animus against the *pudique Albion* and the so-called Pall Mall revelations, which he seems to have taken in with a trustfulness quite unjudicial. The book is interesting for all readers whether lawyers or laymen. T. B.

*The Principles of Pleading in Civil Actions under the Judicature Acts.* By W. BLAKE ODGERS. London: Stevens & Sons, Lim. 1892. xxxii and 260 pp. (8s. 6d.)—This is our first real modern text-book of pleading as distinguished from a practice book. We cannot predict for it off-hand the renown of being the 'Stephen on Pleading' of our children; but it aims at that laudable end, and seems clearly and practically written. We are a little surprised that in the historical introduction, short as it is, there is no mention of the reformed system of equity pleading which flourished for about twenty years before the Judicature Acts, and certainly had a great deal to do with both the merits of the present system and some of its defects on the common-law side.

*The Annual Practice*, 1892. By THOMAS SNOW, CHARLES BURNLEY, and FRANCIS A. STRINGER. Two vols. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 8vo. cxcii and 1326, xxxiii and 363 pp. (25s.)—The Supplement to the last edition has this time grown into a second volume,

containing the statutory forms and other matters 'in less frequent use.' One paragraph of the preface deserves special attention: the editors point out that 'if the mass of dead and useless matter which now incumbers the work and bewilders the practitioner could be cut away, one volume of convenient size would contain the Practice of the Supreme Court': meanwhile it is not their fault 'if the Annual Practice is to some extent a sepulchre of dead procedure.' Perhaps the most important new matter is Order XLVIII A (June, 1891) as to actions by and against firms within the jurisdiction. This has been annotated with special care.

*The Lawyer's Companion and Diary, and London and Provincial Law Directory for 1892.* London: Stevens & Sons, Lim., and Shaw & Sons. 8vo. xxii, 160 and 615 pp. (5s.).—This handy, compendious, and cheap work appears to contain everything that a practising lawyer ought to have about him for immediate reference. It certainly contains many things that are not in the Law List. The only suggestion we have to make is that it should be at least a possible alternative to obtain the Companion and the Diary separately bound.

*The Statutory Trust Investment Guide.* With an Introduction by RICHARD MARRACK. *The Particulars as to Investments eligible*, compiled and arranged by FREDERIC C. MATHIESON & SONS. London: Frederic C. Mathieson & Sons. 1891. Sm. 8vo. vi and 217 pp.—The object of this book, as stated in the preface, is 'to bring before the notice of trustees and beneficiaries in a practical form the wide range of the securities in which they may invest without an authority whatever from their settlements.' We think that the authors have executed their task well, and that their book will be found very useful.

The book is somewhat remarkable as having been written by a barrister and a firm of stock-brokers. We have often thought that a lawyer and a practical man writing in concert might produce a very excellent book. Consider how useful a treatise on Bills of Exchange might be written by Mr. Goschen and Judge Chalmers.

The authors point out a curious result of the manner in which the Trust Investment Act 1889 is drafted: the passage at p. 74 is too long to quote, but the practical result at which they arrive is that if a settlement contains no power to vary securities, the trustees cannot change an investment not authorised by statute into one that is so authorised.

*Copyright, Patents, Designs, Trade Marks, &c.* A Manual of Practical Law. By W. A. BEWES. London: A. & C. Black. 1891. xx and 351 pp. (5s.).—This little work deserves almost unstinted praise. To include in a single handbook all the principal legal monopolies depending on invention, and to treat these concisely, popularly, and accurately, is a task of no common difficulty. Mr. Bewes has accomplished it with a very large measure of success. His book is divided into seven parts. Part I deals with Copyright, literary, artistic, dramatic, and musical, and contains an excellent and useful chapter on the 'Rights of Authors, Editors, and Publishers *inter se*.' In Part II, the law of Patents is fully, but not too fully, considered. Chapter 2 of Part V on 'International and Colonial Arrangements' might with advantage have been inserted at this point. In Part III, the author deals with Designs. In Parts IV and VI, Trade Marks, Trade Name, and Trade Secrets are discussed. These subjects might with propriety have been grouped under one heading, and the distinction between trade marks and registrable trade marks should have been pointed out more clearly.



Mr. Bewes' treatment of trade name and trade secrets is worthy of all praise. Part VII consists of an Appendix of Forms and Statutes, including the recent American Copyright Act. As an introduction to the study, and as a reliable outline, of the subjects with which it deals, this book can be safely and heartily commended.

*The Science of Jurisprudence*: chiefly intended for Indian Students. By W. H. RATTIGAN. Second Edition. London: Wildy & Sons. 1892. 8vo. xii and 398 pp.—This second edition of a book fully noticed by us in the first (iv. L. Q. R. 468) has been considerably revised, and is the better for it, but it is not yet brought up to the English lawyer's standard of accuracy in many little things and some greater ones. Thus Mr. Rattigan cites at least one case from the Weekly Notes which has been reported in full in the Law Reports and elsewhere, and for the *Bernina* case (or *Mills v. Armstrong*) he refers only to the decision of the C. A., ignoring the House of Lords. The editor of this REVIEW, to whom Mr. Rattigan does the honour of referring several times to his writings, is variously described as 'Professor Pollock,' 'Mr. Pollock,' 'Mr. F. Pollock,' two of which descriptions are incorrect and the other unusual. 'I. L. Repts.' alternates with the more correct and accustomed 'I. L. R.' as a form of citation. The statements about Constructive Possession are no longer positively erroneous, but are not yet clear or safe to set before learners: Mr. Rattigan has not faced the essential difference between the doctrines of the Common Law and (at least as generally received and expounded) the Roman law. What is said about the history of Roman contracts is much improved; but what does Mr. Rattigan mean by talking of Anglo-Saxon laws in the middle of the thirteenth century? In another passage on medieval English law two consecutive sentences appear to contradict one another. We do not mean to deny or disparage the substantial merit of Mr. Rattigan's work. It has so much that we are sincerely disappointed in finding it still disfigured by blemishes which, one would think, it would have needed no excessive trouble to remove.

*The Statutes of Practical Utility* . . . passed in 54 & 55 Vict. (1891). By J. M. LELY. Vol. III. Part I. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 1891. La. 8vo. viii and 297 pp. (12s.).—This part contains many Acts of considerable importance, e.g. Mortmain and Charitable Uses, Custody of Children, Lunacy, Slander of Women. The notes are, as usual, concise and workmanlike. Mr. Lely seems to think the discretion given to the Court by the Custody of Children Act, 1891, alarmingly wide. For our part we think the Court of Appeal better fitted to deal with these matters than the House of Commons, and therefore approve the wisdom of Parliament in conferring a large power. In the Foreign Marriage Act (54 & 55 Vict. c. 74), Mr. Lely points out a strange slip or confusion in the requirements as to time of residence, which will probably make an amending statute necessary.

*A Treatise on the Rights and Burdens incident to the Ownership of Lands and other Heritages in Scotland.* By JOHN RANKINE. Third Edition. Edinburgh: Bell & Bradfute. 1891. La. 8vo. liv and 1099 pp. (45s.)  
*The Law of Nuisance in Scotland.* By JAMES C. C. BROWN. Edinburgh: W. Green & Sons. 1891. 8vo. xxxvi and 258 pp.—Probably Scots law does not differ fundamentally from the Common Law on the latter of these topics. But we have too much respect for the independent system of a sister kingdom to emulate a learned Frenchman, whose opinion on a difficult point

of law arising in Peru was once before us. He had adopted the simple method of taking down his Code Napoléon, and advising, without remark, as if the case were a purely French one. Therefore we await, on both these books, the leisure of a specially qualified contributor.

*Is Proof anything more than Probability?* [By J. C. GRAHAM.] London: Stevens & Sons, Lim. 8vo. 19 pp.—Mr. Graham's question, as might be expected, does not embrace the logical controversy about necessary truth. It is confined to proof in matters of disputable fact, such as courts of justice have to decide. The question thus limited is answered by Mr. Graham in the negative:—'The word proof can only be used in legal matters with any pretence to accuracy to mean a high degree of probability, and no other definite meaning can be assigned to it:' and when we speak of evidence 'amounting to probability and not to proof,' we are talking confusedly, and mean that the probability is not sufficient to determine action in the matter in hand. We so wholly agree with Mr. Graham that we have some difficulty in estimating the controversial force of his argument. It ought, however, in our opinion, to convince any one who stands in need of conviction.

*Banking and Negotiable Instruments. A Manual of Practical Law.* By FRANK TILLYARD. London: A. & C. Black. 1891. xii and 303 pp.—This is a neat addition to a neat series of handbooks, upon the aims of which we have already commented. Given that the existence of the series is justified, Mr. Tillyard has performed his task of writing the banker's book in that series carefully and well. Bankers will naturally be interested to read what Mr. Tillyard has to tell them, for he writes clearly and succinctly. Their customers ought to be equally interested, as there is much in Mr. Tillyard's pages which they ought to know. No one who has read the book can fall into the famous error of paying off an overdraft on a banking account by means of a cheque drawn upon the same account. We are a little surprised to find that Mr. Tillyard takes no count of the mode of crossing a cheque to bankers 'account payee,' which is to our mind a more serviceable safeguard than the crossing 'not negotiable.' This matter will, we hope, be mentioned in a second edition of this book, which assuredly deserves to come into being.

*Le droit international codifié et sa sanction juridique.* Par PASQUALE-FIORE. Traduit de l'italien par A. CHRÉTIEN. Paris: Chevalier Marescq et Cie. 1890.—This book is already known in its original Italian guise.

In form it resembles Bluntschli's Code of International law, that is to say the principles are enunciated in the text, and the Commentary thereon is given in the shape of notes. It differs, however, from the late Heidelberg professor's work in that Professor Pasquale-Fiore places himself on the platform of a supposed tribunal applying his book as its guiding code. He starts from the principle that there is a common law of the civilised world, and he foresees the time when the *de facto* 'association' of states will develop into an 'union juridique.'

The translation is by a competent Professor of law of the Faculty of Nancy whose own writings are well known in the French legal world.

*Lehrbuch des Konkursrechts.* Von Dr. J. KOHLER. Stuttgart: Ferdinand Enke. 1891. 8vo. xii and 732 pp.—Prof. Kohler, for whose untiring industry nothing seems to be either too great or too small, has given in this volume a general view of the bankruptcy laws in force in the civilised world. Our own latest Bankruptcy Act, 1890, has found its due place in

the notes, though not known to the learned author in time to be mentioned in the text.

*Les Masuirs, recherches historiques et juridiques sur quelques vestiges des formes anciennes de la propriété en Belgique.* Par PAUL ERRERA. Two vols. Brussels: P. Weissenbruch. 1891. La. 8vo. xv and 539, vi and 320 pp.—This is obviously an elaborate piece of historical work. The documents collected in the second or supplementary volume go back to the middle of the thirteenth century, and ought to be interesting. Further comment must be reserved.

*A Treatise on the Law relating to the Custody of Infants.* By LEWIS HOCHHEIMER. Second Edition. Baltimore: H. B. Scrimger. 1891. 8vo. x and 167 pp.—If we may trust Mr. Hochheimer, the practice of the several States of the Union has produced a much nearer approach to an American common law (or, to speak by the card, Anglo-American) than might have been expected.

*Leading Cases in Modern Equity.* By THOMAS BRETT. Second Edition. London: W. Clowes & Sons, Lim. 1891. 8vo. lii and 386 pp. (16s.).—This edition has the same capital fault as the first: the leading cases are not there, only a kind of enlarged head-note of them.

*A Legal Handbook for Executors and Administrators, intended for the use of the Practitioner and the Layman.* By ALMARIC RUMSEY. London: Swan Sonnenschein & Co. 1891. 8vo. xiv and 238 pp.—The only safe handbook for an executor not learned in the law is a competent solicitor. Subject to this caution, books of this kind may be profitable.

*The Elementary Education Act, 1891.* With Introduction and Notes. By A. ERNEST STEINTHAL. London: Sweet & Maxwell, Lim. 1891. 8vo. 135 pp. (2s. 6d.)

*The Stamp Act, 1891, and the Stamp Duties Management Act, 1891.* With an Introduction and Notes and a copious Index. By N. J. HIGHMORE. London: Stevens & Sons, Lim. 1891. 8vo. xix and 152 pp. (5s.)

*The Law of Bankruptcy, showing the Proceedings from Bankruptcy to Discharge: also the general Rights of Creditors and Debtors, and the Duties of Trustees in Bankruptcy.* By C. E. STEWART. London: Effingham Wilson & Co. 1892. 8vo. xiv and 199 pp. (2s.)

*A Guide to Criminal Law, intended for the use of students for the Bar Final, and for the Solicitors' Final Examinations.* By CHARLES THWAITES. Third Edition. London: Geo. Barber. 1891. 8vo. 119 pp. (5s.)

*Precedents of Deeds of Arrangement between Debtors and their Creditors, &c.* By G. W. LAWBRANCE. Fourth Edition. By H. A. SMITH. London: Stevens & Sons, Lim. 1892. 8vo. viii and 160 pp. (7s. 6d.)

*The Revised Reports.* Vol. II. 1790-1794. (2 Cox—1, 2 Vesey Jr. —4-5 T. R.—1 H. Bl.). Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. London: Sweet & Maxwell, Lim. Boston, Mass.: Little Brown & Co. 1891. La. 8vo. xiv and 854 pp. (25s.)

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EDITED BY SIR FREDERICK POLLOCK, BART., M.A., LL.D.,

*Corpus Professor of Jurisprudence in the University of Oxford.*

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## NOTES.

THE Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. cap. 66) was passed as a necessary corollary to the Land Purchase Act, and in this connection has a considerable bearing on the Government Small Holdings Bill. It is a mixture of the English Land Transfer Act of 1875 and the Land Transfer Bills of 1887 to 1889, plus several special characteristics of its own. Only absolute title is recognised, and (sec. 22) purchasers, past and present, under the Purchase of Land (Ireland) Acts are to be registered without fee or enquiry into title. Registration is compulsory (sec. 22) so long as any charge for advances of purchase money is subsisting. Land may also be registered voluntarily, after examination of title, and payment of a contribution of 2s. per £100 (£1 per £1000) to an Assurance Fund (Rule 77). Land voluntarily registered may be removed from the Register (sec. 20). Local Offices are to be established and managed by the Clerks of the Crown and Peace in the Counties, with additional remuneration for extra work (sec. 7). Other appointments are restricted to barristers and solicitors (secs. 4 & 5). But Rule 8 shows that very little confidence is placed in the local Registrars, every draft entry for the Register (on subsequent dealings as well as on first registration) being sent up by them to be settled in Dublin and entered there in duplicate books. On the death of an owner of land originally sold under the Land Purchase Acts the legal estate devolves on his personal representatives (secs. 83, 84), otherwise the Registrar has to consider the beneficial title before registering a successor (sec. 37). On dealings with registered land, forms are prescribed, but their use is optional (secs. 35 and 40)—this license appears likely to add considerably to the Registrar's labour and responsibilities. Errors arising through fraud or forgery or mistakes of the officers of the



registry are to be compensated out of an Assurance Fund raised by contributions of 2s. per £100 on all dealings for value and on voluntary registrations (Rule 77). This appears high, considering it is in addition to, and not in substitution for, the ordinary examination of title (Rule 31). Boundaries can be registered as conclusive in certain cases (secs. 57, 58, 59). The fees are to be kept down to the level of expenses (sec. 8)—a most useful provision, and peculiar to the Act. In a complicated piece of legislation like this Act, and the Rules made under it, there are naturally many points which would call for comment, and possibly for criticism, did space admit. But at present it must suffice to say that the Act seems on the whole a good one, and likely greatly to assist the objects of the Land Purchase Act. The Small Holdings Bill of the present session would appear capable of much improvement by an amendment to a like effect. Lord Cairns's Land Transfer Act contains ample powers, and a short clause providing for the registration of all small holdings would be all that would be needed.

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A specially competent correspondent writes to us:—

Section 2 of the Foreign Marriage Act, 1891 (54 & 55 Vict. c. 74), runs as follows:—

‘The period of residence required for a marriage under the Foreign Marriage Acts shall be three weeks, and accordingly in section 2 of the Consular Marriage Act, 1849, one week shall be substituted for one calendar month.’

On this section Mr. Lely has the following note in his edition of the Statutes of Practical Utility:—

‘The one week is in direct conflict with the three weeks previously required by the same section. Which prevails? It is conceived that the one week prevails, as being the latest thought of by the Legislature unless there be anything to point to a pure mistake, but that the “accordingly” of this section and the “three weeks” of the next point to such a pure mistake as to rebut such a presumption.’

If the successive Marriage Acts are examined it will be found that there is no such mistake as is suggested.

Under s. 2 of the Consular Marriage Act, 1849, a person intending marriage must have resided one calendar month before he gives the statutory notice, and under s. 3 of the same Act the notice must remain suspended in the consulate for one week before marriage if the marriage is by license, and for three weeks before marriage if the marriage is without license. Therefore the total necessary period of residence is under that Act rather more than

five weeks in the one case and rather more than seven weeks in the other.

The Marriage Act, 1890, limited the period for suspension of the notice to fourteen days, whether the marriage is with or without license, and therefore made the total necessary period of residence a little over six weeks in all cases.

The Foreign Marriage Act, 1891, cut down the total period still further by reducing the period before notice to one week, thus making the total period three weeks.

What Mr. Lely's note shows is the urgent need for consolidating enactments which ought to be simple, but which in their present form are not unlikely to lead astray even persons learned in the law<sup>1</sup>.

In Mr. Lely's previous note, the reference should apparently be to 12 & 13 Vict. c. 68.

The decision of the Court of Appeal (Lord Esher M.R., Lopes and Fry L.JJ.), *Reg. v. Judge of the City of London Court*, reported '92, 1 Q. B. 273, that an action will not lie on the Admiralty side of a County Court against a pilot who in the body of a county negligently damages another ship by collision with his own, is of considerable importance. So far as the case turns upon the construction of the County Courts Admiralty Jurisdiction Acts it is of no general interest; but involving, as it does, the decision that the High Court of Admiralty had no original jurisdiction to entertain an action by a shipowner against the pilot of another ship for damage in a collision caused by the pilot's negligence, it is of wide importance and may produce unexpected results. One result is that the case of *The Zeta* ('91, P. 216) is already under appeal. If a shipowner cannot in a County Court Admiralty action sue a pilot for collision caused by his negligence, can he sue a dock company or any person at all (even, *semble*, the owner of the wrong-doing ship) for similar negligence? This is the question raised by *The Zeta* case, upon which the Court of Appeal is now considering its judgment. In *The Queen v. Judge of the City of London Court* the Court of Appeal was largely influenced by *The Urania*, 10 W. R. 97, where Dr. Lushington did in fact refuse to entertain a suit by shipowner against pilot. The report of this case is not very full, and it is at least doubtful whether Dr. Lushington there decided anything more than that the bond which measures the extent of the pilot's liability could not be enforced in Admiralty. Moreover the argument of Dr. Tristram, who moved for a citation

<sup>1</sup> It is satisfactory to see that the Lord Chancellor has introduced a Bill for this purpose.

against the pilot, was confined to the effect of the then recent statute, 24 Vict. c. 10, and throughout the case there seems to have been no suggestion of an original jurisdiction to entertain the action in Admiralty. The decision therefore does not carry the weight it would carry if the question of original jurisdiction had been argued. The cases which follow *The Urania* add nothing to its authority. The Court of Appeal has, however, treated that case as an authority against the Admiralty jurisdiction, whether original or statutory. Great stress was laid by all three members of the Court of Appeal upon the fact that no precedent of a similar action having been entertained in Admiralty was forthcoming. Perhaps too much was made of this. In the first place there are no reports of Admiralty Instance Court cases of earlier date than the present century. Secondly, until 1840 damage suits were of comparatively rare occurrence. Probably not more than fifty such suits were brought during a century and a half before 1800. It has been stated that the number between 1800 and 1840 was 265. Since 1840 indeed the number of collision actions runs to thousands, but the observation of the Master of the Rolls as to the 'hundreds and hundreds of instances in which such an action against a pilot might have been entertained' lose much of their force when it is remembered that so late as 1834 (*The Girolamo*, 3 Hag. 169) the ship was liable in Admiralty, though her fault was that of her compulsory pilot. Since 1861 *The Urania*, rightly or wrongly, has stood in the way. That the pilot could not in Admiralty succeed upon a plea of contributory negligence in the other ship is scarcely a reason against the existence of the jurisdiction. This perhaps will appear more fully when the decision in *The Zeta* is given.

If the point of law is discussed hereafter before a higher tribunal a more definite decision will have to be arrived at as to the value of the Assignment Books and other records of the High Court of Admiralty. Lord Esher appears to have disregarded them, whilst Kay L.J. treated them as authoritative. In *The Justitia*, 12 P.D. 145, they were recently cited and acted upon by Lord Hannen, the late President; and in *The Ruckers*, 4 Ch. Rob. 73, Lord Stowell recognised them as authoritative in a case involving an important question of jurisdiction. It is to be hoped that *The Zeta* will not be decided without some reference to the cases of *The Warewell* and *The Susan* and *Tills v. The Mary* (Marsden, Ad. Ca. pp. 243, 284). The records in these cases consist of the original sentences, engrossed upon parchment and signed by the Lords Delegates, of whom one or more were common law judges. They appear to be conclusive upon the point that the Admiralty jurisdiction was not confined to cases where the collision was between the hulls of ships;

As we read the judgment of Lord Esher and the arguments of counsel we are carried back to the times when the rivalry of the common law Courts and the Court of Admiralty formed the most burning legal, we might almost say the most burning political, question of the day. Contests between our different Courts are now happily at an end, and we have no reason to suppose that any living judge will feel aggrieved at the language in which Lord Esher pronounced the claims of the Court of Admiralty to almost unlimited jurisdiction with regard to everything occurring on the high seas to be untenable. We could have wished that Lord Esher's remarks on the decision of the Court of Appeal in *The Alina*, 5 Ex. D. 227, had not savoured a little too much of the manner of Lord Coke. Sir George Jessel, like other great judges, made mistakes, but the late Master of the Rolls is not a man whose judgments, even if erroneous, can be treated with disrespect. It must be remembered that the decision by which Lord Esher refuses to be bound 'one particle beyond what it actually decides and determines' is the decision not only of Sir George Jessel but also of James L.J. and Cotton L.J., than whom three stronger judges never sat together in an English Court.

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It is satisfactory that the decision of the House of Lords in the *Mogul Steamship Co.'s* case, reported with creditable promptitude in the March number of the Law Reports, '92, A. C. 25, was unanimous. Not only the decision but the reasons of the Court of Appeal were completely approved; the result therefore now admits of summary statement:—

1. The Courts will not undertake to regulate the competition of traders.
2. They will not found new heads of 'public policy' on disputed economic propositions.
3. There cannot be an indictable or actionable conspiracy without a distinctly unlawful end or distinctly unlawful means.
4. Acts not otherwise unlawful are not unlawful because done in execution of an agreement which is in restraint of trade.
5. Hence the old high common law doctrine of conspiracy, if we may so call it, is no longer tenable, if it ever was.
6. Specific acts of violence, intimidation, fraud or unlawful molestation, and agreements to commit or procure any such acts, remain as unlawful as ever: see especially Lord Hennen's opinion.

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*De Sousa v. British South Africa Co.*, 8 Times L. R. 369, will long be the leading case on the points with which it deals. That it will go before the Court of Appeal and the House of Lords is probable,

but we shall be surprised to find that any material principle laid down by Mr. Justice Wright in his luminous and exhaustive judgment turns out open to question. The principles which that judgment lays down may be thus summed up.

1. English Courts have no jurisdiction to adjudicate upon the title to foreign land.

2. English Courts have in general at any rate no jurisdiction to entertain an action for trespass to foreign land, and their jurisdiction in this matter is not extended by the abolition of local venue (see Rules of Court, 1883, Ord. XXXVI, r. 1).

3. English Courts have jurisdiction to entertain an action for trespass to person or to goods in a foreign country.

4. It is possible that English Courts may have jurisdiction to entertain an action for trespass to foreign land when the question of title is not raised.

All these propositions, except the last, are the fair result of authoritative decisions. Whether the fourth proposition can be maintained is open to grave doubt. There is no decisive authority in its favour; and the plain rule both of common sense and, it is submitted, of English law, is that English Courts ought not to entertain actions which, either directly or indirectly, have to do with rights to foreign land. It must be remembered that the English conception of trespass *quare clausum fregit* is quite peculiar to our own system.

The great merit, it should be added, of the judgment in *De Souza v. British South Africa Co.* is not that it establishes any novel principle, but that it follows and develops principles which have long been more or less distinctly recognised by English Courts. It further emphasises the consideration, which has been often dwelt upon in this REVIEW, that rules of practice, such for instance as the distinction between local and transitory actions, are constantly the expression of fundamental principles.

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The Court of Appeal in *In re Queensland &c. Co.*, '92, 1 Ch. 219, have affirmed the judgment of North J. ('91, 1 Ch. 536) and have held that the rights of the parties must be determined in accordance with the law of Scotland. The judgment of the Court of Appeal also determines a point which does not appear to have been clearly raised in the Court below, namely that the law of Scotland includes the rules of so-called private international law which are maintained by the Scotch Courts. On both points the judgment of the Court of Appeal is right. Unfortunately the language used by the Court is not nearly so satisfactory as the conclusion which it is intended to express. Even a judge so eminent as

Lindley L.J. becomes for once obscure, because of the confusion involved in the use of the term 'international law,' as applied to the different topic known as 'private international law.'

The decision of the Court of Appeal in *Alcock v. Smith*, '92, 1 Ch. 258, affirms the judgment of Romer J. (*ibid.* 238). It determines that a transfer not only of personal chattels but of a chose in action which is valid by the law of the country where the transfer takes place (*lex situs*) is to be held valid in England. As we have already pointed out, *Alcock v. Smith* is the last of a line of cases establishing the principle laid down by Savigny, that the validity of a transfer of individual movables is governed by the *lex situs*. This view, it must be noted, was opposed to the doctrine apparently at any rate upheld by English Courts that the assignment of a movable was governed by the owner's *lex domicilii*<sup>1</sup>.

*Huntington v. Attrill*, 8 Times L. R. 341, is a case of great interest. From it the following principles with regard to the conflict of laws may, with more or less certainty, be deduced.

1. English Courts will not enforce, either directly or indirectly, the penal laws of another country. This principle is of course well established.

2. When a penal action is brought in a foreign country and a judgment obtained against the wrong-doer for a given sum, an action cannot be maintained in England for the debt due on the judgment. The truth of this proposition is assumed throughout the judgment in *Huntington v. Attrill*. It is clearly sound, though there might be some difficulty in citing a direct authority in its support.

3. Probably no action can be maintained in England on a foreign judgment given in respect of any matter for which an action would not have been maintainable in England, e.g. an act which though wrongful by the law of the country where it was done, would not have been wrongful if done in England.

4. 'The rule that the Courts of no country execute the [penal] law of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State, for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.' This is the language of Gray J. in *Wisconsin v. The Pelican Co.*, 127 U. S. 265, and is fully adopted by the Privy Council in *Huntington v. Attrill*.

5. An action is not penal which, though it may be brought for a

<sup>1</sup> See L. Q. R. vii. 308.

penalty incurred by a violation of a statute, is not brought directly or indirectly on behalf of the State or for the vindication of its authority; and if a foreign judgment be obtained in an action which though brought for a penalty is not a penal action, the sum due under the judgment is recoverable in England in an action on the judgment. This is the point directly determined in *Huntington v. Attrill*.

*Tassell v. Hallen*, '92, 1 Q. B. 321, is a case which, to use the words of Lord Chief Justice Coleridge, 'like many others under Order XI, r. 1, is important and by no means easy.' The root of the difficulty lies in the fact that the Courts, when interpreting Order XI, r. 1, are engaged in the effort, new to English judges, to form a consistent doctrine as to the extra-territorial jurisdiction of English Courts. The particular case determines that an action against the assignee of a lease for breach of a covenant to repair contained in the lease is an action in which 'a contract or liability affecting lands or hereditaments situate within the jurisdiction is sought to be enforced,' and that therefore where the land is in England a writ may be served on a defendant in Scotland, where he ordinarily resides. The decision is reasonable enough and follows *Kaye v. Sutherland*, 20 Q. B. D. 147: whether it be really consistent with *Agnew v. Usher*, 14 Q. B. D. 78, is a point on which opinions may differ. The case calls attention to the fact which is often forgotten, that 'the power of the Court is still (except when extended directly or indirectly by Act of Parliament) limited to the territorial area of its jurisdiction and . . . cannot in general affect persons who are outside that area.' This all-important principle would be better understood than it is if the Courts would give up the ambiguity involved in the use of the term 'jurisdiction,' and when 'territorial area of jurisdiction' is meant use the word 'England.'

'More haste less speed' is the only moral of *Fletcher v. L. & N. W. Ry. Co.*, '92, 1 Q. B. (C.A.) 122. A very able judge, more anxious than most men to expedite business, hears the opening speech of a plaintiff's counsel, and perceiving that the speech shows no cause of action, nonsuits the plaintiff. The Court of Appeal tell him that he struck too soon, and order a new trial. That the Court are right is clear. The old system of pleading was justly complained of because it allowed a cause to be lost on demurrer, owing to the technical error of a pleader. But if this preference of technicality to justice was found unbearable, it would be monstrous to reintroduce the same system in a worse form, and

allow a cause to be lost because a counsel from ignorance or incompetence has understated the strength of his client's case. *Et surtout point de zèle* is a maxim as applicable to judges as to officials. The business of a judge is not to do justice, but to administer law.

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*Hebblethwaite v. Peever*, '92, 1 Q. B. 124, will at last make plain to all men that the period of limitation to an action on a judgment is under 37 & 38 Vict. c. 57, s. 8, reduced from twenty to twelve years. It is a satire on our peculiar system of legislation and of Parliamentary draftsmanship that a point which ought never to have been doubtful has needed five or six decisions to make it clear not only to laymen but even to lawyers.

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What is the meaning of the provision of 12 & 13 Vict. c. 92, s. 14 that every complaint under the enactment must be brought 'within one calendar month' after the cause of such complaint shall arise? If X commits an offence on the 30th of May is an information against him brought in time if it is laid on the 30th of June? This is the question which occupied the Court in *Radcliffe v. Bartholomew*, '92, 1 Q. B. 161. The Court held in conformity with precedent and, we conceive, with common sense that the information was laid in time, or in other words that in the computation of the calendar month you must exclude the day on which the offence was committed. This decision establishes one uniform and convenient rule as to the computation of time in regard to legal proceedings. Lay readers will doubtless hold that the difficulty disposed of in *Radcliffe v. Bartholomew* would never have seemed a difficulty to any man but a lawyer. It is worth while therefore noting that the difficulty arises not from any subtlety of law, but from the vagueness or ambiguity of the English language. The mere words of the Statute might just as well mean that the 30th of May was to be included as that it was to be excluded in the computation of the calendar month.

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A sale of jewels to a jeweller in the City of London, if it takes place in a show room over his shop to which customers are admitted only by special invitation, is not a sale in market overt. This is the only point absolutely decided by Wills J. in *Hargreave v. Spink*, '92, 1 Q. B. 25.

The learned judge, however, intimates a decided opinion that the custom of market overt in the City of London does not apply where the shopkeeper is the purchaser, not the seller, of the goods.

It is rather to be regretted, from a legal point of view, that the



case was not decided on this latter ground, which is itself merely a deduction from the general principle that the rules as to sale in market overt exist for the protection of the *bond fide* customer and not for the protection of the tradesman who happens to purchase in the course of his trade.

The case further forcibly suggests that the time has arrived when the whole law as to market overt should be reconsidered, and modified so as to meet the existing conditions of English life. There is a good deal to be said for giving a purchaser a good title to wares which he purchases in a place where they are usually and openly sold. But there is no valid reason for giving to a customer who purchases goods in the City of London, a privilege which is not given to a customer who purchases goods in a shop at Manchester, or in a shop in Bond Street.

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*Grant v. Anderson*, '92, 1 Q. B. (C. A.) 108, affords a noteworthy example of the way in which mere rules of practice often cover a wide general principle. The case in substance as treated both by the Queen's Bench Division and the Court of Appeal decides two points. The first is that a foreign partnership, the members of which are foreigners resident out of England, cannot, though carrying on business in this country, be served with a writ under Order XLVIII A, rr. 1, 3, by service on their manager at their principal place of business in England. The Rules in short of 19 June, 1891, have not really affected the principle established by *Russell v. Cambefort*, 23 Q. B. D. (C. A.) 526. The second point is that foreigners who carry on business, and are domiciled and resident in a foreign country, do not by employing a commission agent in London, who occupies an office there and takes orders for the firm, 'carry on business' in England.

On both points the decision is thoroughly satisfactory. It may, however, be doubted whether the interpretation put by the Court of Appeal on the words 'carrying on business' in Order XLVIII A, r. 1 is consistent with the decisions as to the meaning of a 'profession, trade, employment, or vocation, exercised with the United Kingdom' in Schedule D of the Income Tax Act (see 16 & 17 Vict. c. 34, s. 2, Sched. D). Unless a very subtle distinction can be drawn between 'exercising a trade' and 'carrying on a business' the result of the decisions is that a firm who do not carry on business in England for the purpose of being sued there, do carry on business in England for the purpose of being taxed there (see *Pommery v. Apthorpe*, 56 L. J. (Q. B. D.) 155; *Werle v. Colquhoun*, 20 Q. B. D. (C. A.) 753). When one of the so-called Champagne

Cases comes before the House of Lords something, we suspect, will be heard of the decision in *Grant v. Anderson*.

Mysterious is the position occupied by a married woman in respect of her contracts.

Two theories are possible, and might be carried out with logical consistency.

The one is that a married woman is liable on her contracts in the same sense as a *feme sole* or a man. This theory of personal liability is, at bottom, inconsistent with the general interpretation placed by the Courts on the Married Women's Property Act, 1882, and probably also with the intention of Parliament.

The other theory is that a married woman by contracting does not incur any personal liability, but only binds what has been happily called her 'free separate property.' This is the doctrine which we venture to say lies at the bottom of half the decisions given under the Married Women's Property Act, 1882, s. 1. If it were strictly carried out it would lead to perfectly logical but to absurd and unjust results.

The Courts therefore have modified their general view that the contracts of a married woman bind only her free separate property by occasional deviations towards the opposite theory 'that a judgment against a married woman, though only enforceable against her separate estate not subject to a restraint upon anticipation, is precisely the same as a judgment against an unmarried woman, except that in the case of a married woman there is no remedy upon the judgment against her personally such as by committal to prison, and that the judgment cannot be made the foundation of bankruptcy proceedings unless she trades separately from her husband,' *Pellon Bros. v. Harrison* (No. 2), '92, 1 Q. B. (C. A.), 118, 120, 121, per Lopes L.J. The result of the judgment from which we have cited the foregoing expressions, and which undoubtedly follows *Holby v. Hodgson*, 24 Q. B. D. (C. A.) 103, is satisfactory, for no one would desire that a married woman should escape from the payment of the costs duly incurred by her in an action. But the grounds of the judgment are logically difficult of defence. The time has come when Parliament should make the law as to the liabilities of married women at once consistent and just. Defiance of consistency means in the long run defiance of justice.

When will Members of Parliament learn to write intelligible English? This is the main question suggested to a critic by *Burkill v. Thomas*, '92, 1 Q. B. 99, (C. A.) 312. Under the County Courts Acts, 1888, sec. 65, an action in the High Court may under

certain circumstances be ordered by a judge to be tried in any County Court 'in which the action might have been commenced, or any Court convenient thereto.' Neither Lord Coleridge nor Mathew J. could place any interpretation whatever on the expression 'convenient thereto,' and since 'convenient' and 'adjacent' are, as Lord Coleridge remarks, not convertible terms, the Court were driven to treat the word 'thereto' as in fact unmeaning. The Court of Appeal took a view of the law which enabled them to avoid the criticism of Parliamentary English. But to judge by *Curtis v. Stovin*, 22 Q. B. D. (C. A.) 513, the Court of Appeal have for some years recognised the fact that Parliamentary English needs a good deal of judicial emendation in order to make the peculiar language intelligible either to lawyers or to men of common sense.

An extraordinary dictum attributed to the Lord Chancellor has been more than a nine days' wonder to the Equity Bar at large. Thinking it already notorious enough, and for other reasons, we thought it more fitting at the time to observe respectful silence. But one or two learned correspondents have since called our attention to the passage as if expecting us to make a note of some sort. In *Smith v. Cooke*, '91, A. C. at p. 299, Lord Halsbury is made to say: 'If it is intended to have a resulting trust, the ordinary and familiar mode of doing that is by saying so on the face of the instrument.' Apart from the elementary character of the difference between a *resulting* and an *ultimate* trust (the latter being what the sense appears to require), the judgment of Kekewich J. in this very case, which the House of Lords restored (45 Ch. D. at p. 41), begins by stating that a resulting trust is a trust which is not expressed. A resulting trust can no more be on the face of an instrument than a contract 'implied in law' can be on the face of a written agreement, and, if we could conceive the House of Lords in its judicial quality to be capable of forgetting this, the judgment below was there to remind them of it. Evidently, therefore, we have here a matter of a mere verbal slip, one of those queer and annoying semi-mechanical confusions which may happen to anyone. Apt verbal correction would have brought out the true meaning, namely that no good reason appeared, on the facts of the case, for implying a certain trust which had not been expressed. But what are we to say of the reporting and editing that perpetuate such a slip as the deliberate utterance of the head of the English legal profession in general and equity jurisprudence in particular?

In *Stewart v. Casey*, '92, Ch. 104, 115, Lord Justice Bowen intimated, in effect, that in a case properly raising the point the

Court of Appeal might well consider the doctrine of a past consideration supporting a subsequent express promise, as commonly stated on the authority of *Lampleigh v. Braithwait*, open to discussion. This dictum, perhaps of more general interest than the case in which it occurs, is not mentioned in the Law Reports head-note. *Lampleigh v. Braithwait* is cited from Smith's Leading Cases, and not even from the latest edition, without any reference to the original report in Hobart.

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The decision of the Court of Appeal in *Helley v. Pinkney & Sons S. S. Co.* '92, 1 Q. B. 58, that the captain of a ship is the fellow-servant of the crew within the rule of 'common employment,' was a necessary result of the authorities. Indeed, the action could hardly have been brought if there had not been another point on the Merchant Shipping Act, 1876. This is one more illustration of the unreasonable and unsatisfactory state in which the law of compensation for injuries to servants in the course of service remains in cases outside the Employers' Liability Act. As to seamen being outside the Act there is no doubt. But the manner in which it was done is among the minor curiosities of legislation by reference.

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If *A* lends his chattel to *B* for a term, and *B* entrusts *X* with the custody of it, and the chattel is injured by *X*'s negligence (outside any course of employment as between *X* and *B*), has *A* no remedy against *X*? Both old and modern authorities go to show that *A* has a special action on the case against *X*: not trover, because he has not the immediate right to possession. Cave and Charles JJ. assumed in *Coupé Co. v. Maddick*, '91, 2 Q. B. 413, without examining those authorities, that there is no remedy at all. Mr. Beven's criticism of the case in the February number of the 'Law Magazine and Review' certainly deserves attention on this and other grounds. What was actually held appears to be that the contract of hiring includes a warranty by the hirer that reasonable care shall be taken of the chattel hired by all persons having the custody thereof with the hirer's consent, whether being or acting as his servants, or acting within the scope of their employment, if any, or not. We are not prepared to say that this is unreasonable law: but it ought not to be left doubtful how much of it is new.

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In reversing the decision of the Divisional Court in the Maybrick Insurance Case the Court of Appeal (*Cleaver v. Mutual Reserve Fund*

*Life Association*, '92, 1 Q. B. 147) have taken precisely the view expressed in the LAW QUARTERLY REVIEW last October, vii. 306-7, viz. that whatever principle of public policy might prevent Mrs. Maybrick personally from claiming the benefit of her felonious act, it could be no bar to her husband's executors recovering the policy moneys as part of his estate under the resulting trust arising in favour of that estate under the Married Women's Property Act, 1882, on the trust for Mrs. Maybrick becoming legally unperformable. When persons, whether an insurance company or not, set up a principle of public policy as forbidding them to fulfil a contract for which they have received the full consideration, the principle so vouched requires, as Lord Esher observed, to be closely scrutinized: because, generally speaking, public policy would rather have people perform their contracts.

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That posthumous pride which consists in wanting to have your tomb kept in repair is always receiving a rebuke from the Courts. It is a perpetuity without being a charity, and bad accordingly. Designedly or undesignedly (for the will seems inartificially drawn) the testator in *Re Tyler* ('91, 3 Ch. (C. A.) 252) invented a successful plan of circumventing the rule which will no doubt serve hereafter as a useful precedent. This was by the simple device of giving a handsome legacy to a charity with a gift over to another charity, if the tomb was not kept in repair. Doubtless Charity No. 1, with the wistful eyes of Charity No. 2 upon it, will see to the repairs, though it had the ingratitude to try and have the condition declared void.

An 'abiding condition' of a gift to endow a church that the clergyman should wear the 'black gown' in preaching (*Re Robinson*, 61 L. J. Ch. 17) is a more cruel kind of testamentary caprice. As an incumbent of High Church proclivities might decline the gift at the price, North J. kept the legacy in Court, but the learned judge does not seem to have addressed himself to the question whether the black gown, being an uncanonical vestment, might not render the condition invalid.

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Lord Bramwell, beginning the study of equity (*Salt v. Marquess of Northampton*, '92, A. C. 1, 18), recalls the courage of Cato with Greek at a similar age. The result at which that eminent master of the common law has at present arrived is that the invention of the equity of redemption, whether it originated in 'piety or the love of fees,' was a mistake *ab initio*, part of a bad policy of moulding people's contracts for them which in the end has done

more harm than good. However, it is too late now for equity to repent or amend. *Salt v. Marquess of Northampton* is, it must be admitted, a good text for Lord Bramwell to illustrate the 'roguishness' of equity, for the understanding, if not the agreement, of the parties in that case seems certainly to have been that the insurance company should have the benefit of the policies in the event which happened. The policy of moulding people's contracts for them, so objectionable to Lord Bramwell, cannot be treated however as a 'medieval superstition,' for in settling the statutory form of a bill of sale the Legislature has recently been doing just the same thing, and is likely to go on doing it. 'The selfish and the strong still tyrannise,' as Shelley says.

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Where an owner of property conveys by contemporaneous deeds land to *A* and an adjoining house to *B*, *A* cannot build so as to obstruct *B*'s lights. So at least Jessel M.R. decided in *Allen v. Taylor* (16 Ch. D. 355). In such a case one grantee it is obvious must suffer, but it is not so easy to see why *A* should lose his building rights more than *B* his lights. In *Phillips v. Low* ('92, 1 Ch. 47) we have Chitty J. applying the principle of *Allen v. Taylor* to the rights of devisees under a will. Successive devises are indeed so far analogous to contemporaneous conveyances that they take effect at one and the same time, i. e. the death of the testator: but when we come to see what each devisee takes in such a case as that where land is devised to *A* specifically and the residue including a house to *B*, it would seem, as a matter of construction, that *B* can only take what is left after satisfying all *A*'s rights including the right of building.

*Taws v. Knowles* ('91, 2 Q. B. (C.A.) 564) was also a case of two devisees of adjoining properties. The peculiarity there was that the right of way enjoyed by the owner of one devised property over the other was outstanding in a mortgagee. The owner of the servient tenement took a reconveyance, and of course by doing so was entitled to stop up the way against the devisee of the dominant tenement, who could only take what the testatrix could give subject to the mortgage.

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Negotiable instruments are the common currency of commerce, and as such public policy requires that they should be kept plain and simple. Thus an acceptance may under the Bills of Exchange Act be qualified, but the qualification must be clear and unequivocal. Otherwise the bill becomes a mere trap for indorsees. In *Meyer v. De Croix* (65 L. T. R. 653) the bill was stamped accepted, and over

the acceptance were written the words 'In favour of F only.' It was a nice point, but the view of the majority of the Law Lords will no doubt meet with approval in commercial circles. Carelessness in business is not a thing to be encouraged, but it is a misnomer to call it carelessness when an indorsee is put off his guard by a misleading acceptance.

In holding that a *bonâ fide* buyer of an English bill in Norway does not take subject to English equities *Alcock v. Smith* ('92, 1 Ch. (C. A.) 238) affirms like *Meyer v. De Croix* the principle of free negotiability.

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In these days of cash versus credit it is not uncommon for tradesmen to append to an account rendered a note to the effect that interest will be charged after twelve months' credit. A notice of this kind came before the Court in *Re Lloyd Edwards* (61 L. J. Ch. 23), and it was argued on the authority of *Bruce v. Hunter* (15 East 223) that 'not objecting to a charge of interest amounts to a promise to pay'—an alarming proposition whether the silence which gives consent relates to a tradesman charging interest or an alleged promise to marry (*Wiedemann v. Walpole*, '91, 2 Q. B. (C. A.) 534) or a railway company's warning that it is going to transfer your stock (*Barton v. London & N. W. Rly. Co.*, 24 Q. B. Div. 77). Adopted as a legal maxim it would, as Lord Esher said, 'make life unbearable.' Even Lord Justice Bowen's limitation of the proposition to circumstances rendering it more reasonably probable than not that a man would answer seems a somewhat dangerous dictum: for the true inference to be drawn from silence depends on a variety of special circumstances too complex to admit of any rule. The reasonableness of a proposed term like that of paying interest is an element, but only an element, of evidence.

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It may seem rather a hard case, that because an inventor as in *Nuttall v. Hargreaves* ('92, 1 Ch. (C. A.) 23) leaves the real point of novelty out of his provisional specification, he should lose the benefit of a perhaps really meritorious invention. But the hardship, such as it is, has its root in public policy, and not in technicality. Every monopoly derogates from the common law right of free trading. In the case of patents, the law indeed allows such a monopoly for a short period in consideration of the public benefit derived, but still, so great is its jealousy of the exclusive privilege, that it insists on the inventor when he asks for protection defining precisely in his provisional specification the area of protection, and

so limiting his encroachments. Great abuses arose in the early days of patents from the extreme generality of titles for inventions founding large and indefinite claims, and these abuses would soon recur, were not the strong monopolising spirit in human nature kept in check by specifications. The limitation of trade-marks to particular classes is dictated by the same policy. There is a further reason for requiring the provisional specification to define the invention that the Crown as the highest Trade Protection Association may know what benefit, what *quid pro quo* the public are to get in return for the grant.

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'It is not the law that if a lady make a sacrifice to get her husband out of a scrape she can necessarily impeach the security she gives even although the result is to stifle a prosecution.' Thus Lord Justice Lindley (*McClatchie v. Haslam*, 65 L. T. R. 691). The admonition comes opportunely after *Jones v. Merionethshire Building Society* ('92, 1 Ch. (C.A.) 173), where the friends of the defaulting secretary were successful in getting their security set aside. The distinction between the two cases was that in *Jones v. Merionethshire Building Society* the only possible inference from the evidence was that the friends came forward on the terms of 'no prosecution.' In *McClatchie v. Haslam* the evidence was not enough to justify the inference that the wife signed the security to save her husband, as she said, from a prosecution. Setting aside deeds is a jurisdiction requiring to be very cautiously exercised. A person having repented of his acts is not a recognised equity for undoing them.

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Once more the authority of *Derry v. Peek* is invoked to confound the conclusions of common sense. This time it is a careless certificate of 'Lloyds' (*Thiodon v. Tindall*, 65 L. T. R. 343). The classification of ships is a matter peculiarly within the cognisance of that society, one in fact for which the society exists, and what the object of such a certificate is unless it is to be shown to others as a reliable document, as it was in fact to the purchaser of the yacht in *Thiodon v. Tindall*, it is difficult to imagine. 'Lloyds' knows, must know this authoritativeness of its certificate, and the knowledge imposes in morals and ought to impose in law an obligation of using care to see that the certificate is correct,—an obligation recognised by Chitty J. in *Cann v. Willson* (39 Ch. D. 39). Cockburn C.J., it seems, years ago refused to treat such a negligently false Lloyds' certificate as supporting an action of deceit or of warranty against the society by a third person who had been misled. But deceit is one



thing, negligence is another. Moreover, our notions of the duty of using care are constantly receiving enlargement with the growing complexity of society. If *Derry v. Peek* does really give immunity to experts, who issue such certificates or valuations as reliable documents, the sooner we know it from the House of Lords the better. It is not a necessary corollary from *Derry v. Peek*, as Lord Herschell's remarks at p. 360 show.

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In *Turner v. Hockey*, 56 L. J., Q.B.D. 301, the headnote contains these words: 'An auctioneer who in the ordinary course of his business sells by public auction for *A* goods ostensibly belonging to *A* but really belonging to *B*, and without notice pays over the proceeds of the sale to *A*, is not guilty of a conversion.' It may be doubtful whether an auctioneer so acting is or is not guilty of a conversion, for Lord Bramwell has said—'I have frequently stated that I never did understand with precision what was a conversion' (4 Ex. D. p. 194); but it seems clear that the auctioneer who is so unfortunate as to have sold at the orders of one man the chattels of another will be ill advised if on the authority of the headnote in *Turner v. Hockey* he defends an action brought by the true owner to recover the value of the goods. After being questioned by Romer J. in *Barker v. Furlong* ('91, 2 Ch. p. 183), the headnote in *Turner v. Hockey* (if not the decision itself) has been overruled by Collins J. in *The Consolidated Bank v. Curtis* (8 T. L. R. 403). In the latter case the defendant auctioneers, at the order of a grantor of a bill of sale of furniture, *bona fide* in the ordinary course of business, sold the furniture on the premises of the grantor, delivered the articles to the purchasers, and paid over the proceeds of the sale to the grantor. The grantee of the bill of sale brought an action against the auctioneers for the value of the goods and succeeded. Of course the auctioneers have a remedy against the grantor (*Adamson v. Jarvis*, 4 Bing. 66), but in many such cases the remedy would be worse than the disease. This is one instance of the too familiar difficulty 'whether *A* or *B* shall pay for the frauds of *C*?' but it is submitted that in cases like *The Consolidated Bank v. Curtis* reasons of public policy favour the auctioneer rather than the moneylender.

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We accidentally omitted to mention in our last issue that the reversal of *Johnson v. Lindsay* in the House of Lords, '91, A. C. 371, was anticipated some months before by two judges of the Court of Appeal in New Zealand, who distinctly refused to follow the majority of the Court of Appeal at home: *Nystrom v. Cameron*,

9 N. Z. L. R. 413, per Williams and (though suggesting a possible distinction) Denniston JJ. The Court was equally divided.

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It was a common practice of reporters in the latter part of the eighteenth century, and even later, to report decisions in the name of 'The Court,' without mentioning what judges were present, when separate judgments were not delivered. Modern reporters have generally abandoned this practice as inconvenient. We do not know why a reversion to it appears in the February number of the *Law Reports* (*In the Goods of Everley*, '92, P. 50: 'The Court made a grant,' &c.).

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Lord Bramwell contributed a pithy and characteristic article on cross-examination to the February number of the *Nineteenth Century*. Most of our readers will have read it long before this note is published. We agree with Lord Bramwell in the main, and will merely add one more reflection to his. Brutal or malicious cross-examination is a blunder as well as a social offence. It may ruin the case for which it is used. If competent counsel do commit this offence, it is not committed out of mere gratuitous perversity. They would not run the risk to please themselves. It must be then to please somebody else. And who can that be? Manifestly their own clients, if any one. We do not say a barrister is justified in stooping to gratify such tastes; but the fault is ultimately with the public more than the profession. If all litigants, or a clear majority, were determined to fight like gentlemen, these things would not happen. Even so many a well-to-do British parent sends his boys to school with the broadest hints, by conduct if not in words, that it matters nothing whether they work or not, and then grumbles at the schoolmaster for not making them scholars.

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It has become quite a settled custom for judges of the Supreme Court to speak of one another as brethren. Thus Mathew J. agrees with 'my brother Collins,' '92, 1 Q. B. at p. 93. It is a pleasant and courteous custom, though its original reason has ceased. Before the Judicature Acts the judges of the Superior Courts at Westminster addressed each other, and also serjeants pleading before them, as 'brother,' not because they were judges, but because they were serjeants at law. The Lords Justices of the old Court of Appeal in Chancery, and the Vice-Chancellors, never used the term, so far as we remember. After the Judicature Acts came into operation there

was some little hesitation for a while. A subtle question might still be raised whether the few surviving serjeants ought or ought not to be addressed in Court as 'Brother A.' by modern judges who have never been serjeants. It is a curious little bit of the history of forms, and might easily be forgotten but for one happy accident. 'Brother Buzfuz' will preserve it so long as men read the *Pickwick Papers*.

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*It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances ; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.*

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VILLAINAGE IN ENGLAND<sup>1</sup>.

THE appearance of Mr. Vinogradoff's work, or rather of its first instalment, has long been awaited with interest by all who are engaged in studying the history of European society. Mr. Vinogradoff is well known as an expert in the study of mediaeval documents, and is thoroughly acquainted with the details of the judicial and manorial records which have in recent years appeared in such surprising abundance. Historians are learning, as is pointed out in the introduction to these Essays, to take such legal and economic documents more and more into account as compared with what may be learned from chronicles and statutes. The time has come for the concentration of results, and the collection of the general principles that may be found underlying a multitude of instances. Mr. Seebohm and Mr. Gomme have already done much in this way to illustrate the history of the village communities in this country. Mr. Seebohm, following perhaps too closely in the steps of Guérard and Fustel de Coulanges, finds the source of the village customs in the institutions of the Roman province of Britain. Mr. Gomme's work takes note of even older influences, and regards the appearance of such communities in our country as being in the nature of a survival from prehistoric times; he will not allow that the group of men with common duties and privileges and cultivating their lands in common ought to be regarded as a peculiar institution of the Aryan race, and he claims in a very forcible argument that our study should be regarded rather as belonging to 'the science of comparative custom' than as a chapter in the history of a particular people. Both writers have made good use of our mediaeval records in the exposition of their divergent theories, and it is now a necessity for everyone who would introduce or support another doctrine to refer to the same body of evidence and produce the same kind of proofs. Mr. Vinogradoff appears among the champions of the Teutonic origin of our village customs, and as an opponent of M. Fustel de Coulanges, 'the most remarkable of French mediaevalists,' so far as he fought against the Germans and contended for 'an early development of private property in connexion with

<sup>1</sup> Villainage in England. Essays in English Mediaeval History. By Paul Vinogradoff, Professor in the University of Moscow. Oxford: Clarendon Press. 1892. 8vo. xii and 464 pp.

Roman influence.' He is led of course to oppose the same kind of doctrine as it appears in Mr. Seebohm's work, while he pays a well-earned tribute to the 'originality and width of conception of one who has done great things for the advancement of social history.' The Essays now before us show that he is well equipped for his task. He had already studied the Cartulary of Battle Abbey and Miss Lamond's edition of Walter of Henley before they appeared in print, and he is perfectly familiar with the Cartularies of Ramsey, Bury St. Edmunds and St. Paul's, and the manorial rolls of Broughton, King's Ripton and Cressingham, besides Plea Rolls and Hundred Rolls and a multitude of other public records. The details of Mr. Seebohm's work, as will appear later, are closely discussed in these Essays. Mr. Gomme's latest book, however, seems hardly to have come to the writer's notice in time for making as many references as he would have desired. The records above-mentioned, as the author points out, present us with a mass of materials of one and the same kind, 'which, for all its wealth and variety, presents great facilities for classification and comparison.' The author proposes to himself to bring together the results of the feudal period, and by that means to gain the power of working back into the 'imperfectly described pre-feudal age,' and to open the way by careful essays on the documents of the twelfth and thirteenth centuries to another work, or another portion of the same great work, 'on the origins of English peasant-life in the Norman and pre-Norman periods.'

The introduction to these Essays deserves very careful attention. Mr. Vinogradoff does not of course attempt to describe the whole course of historical study in this country; but he says enough in a few pages to indicate the scope of his work as contrasted with what has been done before, and to show 'in what perspective the chief schools of historians present themselves to his view, and in what relations they stand to each other.' He deals lightly with the work of the seventeenth and eighteenth centuries. The learning of Selden and Madox was concentrated on particulars, and they never dealt with the history of the nation as a whole. Lord Coke receives hard usage; it is allowed that he brought facts into a system, but it was of the strictly legal kind; we are told of his undigested historical knowledge and of his 'naive perversion' of most of the particulars. Most of the historical arguments of the last century are dismissed as being nothing but political tracts, and one cannot help agreeing to some extent with the severity of the judgment passed upon the elegant compilations of Blackstone. The real study of the subject began on the Continent with the philosophic methods of Niebuhr and Savigny; in our own country Allen traces the kingly power to the traditions of the Empire, and

Sir Francis Palgrave began to exercise a powerful influence in the historical field by his 'entirely new construction of Anglo-Saxon history.' Mr. Vinogradoff regards the History of the Commonwealth as deserving our special attention and being 'certainly the first attempt to treat the problems of mediæval social history on a large scale and by new methods.' Hallam is praised, but is relegated to a secondary post, as being chiefly concerned with constitutional history and the discussion of technical points of law. In Palgrave's view of our ancient agrarian system the Anglo-Saxon invaders were a select band of conquerors who reduced the British natives to serfdom: and he accounted for the 'mixed organisation' of the manor or township by the theory that the English modified their old communal institutions as soon as they became acquainted with the system of individual ownership and entered upon 'their Roman inheritance.'

Too much stress has often been laid on the fact that the barbarian institutions were much affected by their contact with the civilisation of the Empire. That influence was much greater upon the Continent than in our own country, where the Roman usages seem to have been adopted late and mostly at second-hand, being borrowed in great part from the Romanised Franks. But even with regard to England theories have been broached as to the continuity of the provincial institutions which would leave hardly any room for the usages of our German forefathers. The case is somewhat different with respect to France, where the invaders steadily endeavoured to adopt as much as possible of the older system. Mr. Vinogradoff sums up the matter with a strong feeling in favour of the German school. Thierry, he complains, argued for a gradual rise of Gallo-Roman civilisation against the Teutonic conquest; 'men of great power and note, from Raynouard and B. Guérard down to Fustel de Coulanges in our own days, have followed the same track with more or less violence and exaggeration; they are all at one in their animosity towards Teutonic influence in the past, all at one in lessening its effects, and in trying to collect the scattered traces of Romanism in principle and application.' He admits that the German school responded boldly to the attack, 'and went as far as the Romanists on the other side.' When he comes to the later English historians he shows how German scholarship found potent allies in this country; the Germans and English are found fighting in the same ranks; 'Kemble, K. Maurer, Freeman, Stubbs, and Gneist form the goodly array of the Germanist School on English soil.' We may illustrate this point by a reference to the Constitutional History, in which Dr. Stubbs traced the descent of our institutions from the primæval

German polity, and showed how large a part of the Common Law might be deduced from strictly primitive custom, while its feudal element 'may be traced through its Frank stage of development to the common Germanic sources.'

Great importance is justly attached to Nasse's account of our ancient agricultural system, and to Sir Henry Sumner Maine's masterly investigation of the history of the village community. Nasse was chiefly interested in the connexion between the usages of English and German husbandry. Maine took more note of the influence of Roman civilisation upon the development of territorial lordship. The invaders adopted the system of private property and large estates managed by servile labour: 'their village community was broken up and transformed gradually into the manorial system.' Nevertheless, as we are reminded, our English writer traces his economic history from a community that was originally free, while Professor Nasse took the existence of such a community for granted as a matter of course.

Mr. Vinogradoff calls our attention especially to what he calls 'the subjective side of history.' Historical literature, as he puts the case, growing in the atmosphere of actual life, 'had to start from its interests, to put and solve its problems in accordance with them.' Writers are influenced by their private likes and dislikes, though in the long course of research real progress is made towards abstract correctness and the bias of individual workers becomes unimportant, though like Paolo Giovio they may have used an iron pen for their enemies and a pen of gold for a friend. At present it would seem that we are all in full reaction. The existing condition of European politics has led, we are told, to a widespread fermentation of thought, and there is besides 'a growing distrust of preconceived theories' and a desire to reconsider problems which may have been too lightly solved. The Germanist School, holding strong views as to individual liberty, were keen about the history of the free communities of ancient times; but there is a new school which no longer feels so much interest in 'Teutonic freedom,' and they have been led to regard the progress of society as 'starting with the domination of the few and the serfdom of the many.' The results of this tendency may be studied in the work of Mr. Seebohm, to which we have already referred, and wherever else the 'Manorial School' has exalted the influence of great estates against 'the democratical conception of the village community.' Mr. Seebohm, as is known to all who feel an interest in our history, successfully showed the identity of the mediaeval agriculture with that which prevailed long before the Norman Conquest. He also collected valuable evidence as to the design manifested by the equality of the holdings in the

open fields, though he seemed to press his argument too far in insisting that this equality was always a badge of serfdom. He viewed the manor as being essentially an estate managed by servile labour, and endeavoured to show its identity as an institution with the Roman estate or villa, as existing here during the Roman occupation. This could only be done by putting on one side the difficult problems relating to manorial jurisdiction, as well as many pieces of evidence pointing in various instances to an original joint ownership by a community. His readers were left with the choice between a belief that the Roman system was never disturbed, or that if disturbed it was re-introduced by invaders coming from a country where there had been such a continuity, or in other words by people from a Romano-German province in which they had acquired 'the peculiar manorial instincts' which became a kind of second nature to them. Mr. Gomme makes an apposite quotation from Grimm, who protested against the explanation of the German mythology by Roman influences: 'At that rate there will be nothing left us of our own but the bare soil that drank in the foreign doctrine.' Mr. Gomme adds that even the soil is not our own, if the opinion be correct that our village-community was reared on 'the undestroyed and living Romanised land-system.' He sees indeed but little room for Roman elements on English soil, and he propounds an interesting theory as to the survival of many archaic usages of the prehistoric tribes, for which there is no place in the present discussion. These Essays stop short before arriving at the ground which Mr. Gomme has occupied, and so far as they are concerned the discussion is still confined to the question whether the English village was always a community of serfs working, like the Roman *servi* and *coloni*, upon an estate of the continental type. Mr. Vinogradoff naturally gives much weight to Mr. Seebohm's theory of mediaeval history; and he points out as one thing that is certain among the perplexing questions which have been raised, that 'this last review of the subject has been powerful enough to necessitate a reconsideration of all its chief subjects.'

The first Essay deals with the legal conception of villeinage, as it existed among the English peasantry between the times of Henry the Second and Edward the First. It is a common opinion that mediaeval serfdom was totally distinct from the slavery of the ancient world, except in those cases under the later Empire, where the land-holding *servi* and *coloni* were allowed a certain semblance of freedom. But in contrast to this view we are shown by direct evidence that the majority of the peasants were regarded even by Bracton as being bondmen or villeins in blood, whose possession of lands and goods was entirely precarious, and whose very bodies were in theory the



lords' property, subject to certain provisions of the criminal law designed in the public interest. Nay more, notwithstanding the apparent differences of rank and class among them, which seemed to imply a real gradation in servitude, according to the dominant opinion there were no degrees in slavery. All their customary distinctions as to manorial duties and privileges might be disregarded as less than nothing. If a man were a villein in blood of any kind he was a slave and little better than a chattel, unless he could claim some exceptional privilege existing in the domains of the Crown. The lords, it was held, could in any ordinary case sell their serfs, or remove them from their holdings, or confiscate their earnings, as they might feel disposed; and in the face of any evidence of serfdom the King's Court were powerless to interfere. Such was the hard doctrine laid down by the masters of the Common Law at that time; and we can hardly acquit Bracton of a somewhat cruel levity of conduct in copying down half-obsolete passages of the older Civil Law about slaves as authorities upon the mode of dealing with the major part of the English yeomanry and husbandmen. This theory, pedantic as it was and utterly unsuited to the circumstances of this country, was no doubt carried out here and there into practice by tyrannical seigneurs: it is plain from the discussions which followed later that it never was the law, and that there was no reason why the lawyers in those earlier times should not have been as keen as the judges of later days in devising expedients in favour of liberty.

The natives working on an English manor ought not in any case to be regarded as chattels or as being like the negroes on an old-fashioned plantation. Their position much more resembled that of the *colonus* in his worst days, who had become little better than a serf in consequence of an ingenious theory of the civilians that his labour was indissolubly connected with his farm. The *colonus* could even be shifted from holding to holding under certain circumstances in much the same way as the English ploughman might be transferred from one plot to another, when the lord chose to give him an equivalent for the loss of a former holding; but on the whole it must be allowed that the ploughman was inferior in position to the *colonus*, partly because he was not so well protected by the State, and partly because his labour was regarded as being annexed to the manor and its demesne, and not to the piece of land which he occupied by precarious tenure. Nevertheless, as Mr. Vinogradoff points out, the connexion between the possession of the manor and the right to exact the services of the villein imparts a very peculiar character to serfdom as it existed in England. The bondman's liberties were not protected by the connexion of his labours with the soil, and in fact the lord's title depended upon the praedial tie. Mr. Vinogradoff

sums up the matter by saying that 'the unfree peasant of English feudalism was legally a personal dependant, but that his personal dependence was enforced through the territorial lordship.' On this part of the subject he cites a curious passage from Britton, to the effect that as bondmen were annexed to the freehold, they were not devisable, so that the Church could take no cognizance in the Courts Christian of the testamentary gift of a villein. This is another contradiction of the theory of the ancient lawyers that the serfs should be regarded as chattels; and this contradiction supplies another instance of 'the peculiar modification of personal servitude by the territorial element.' The serf, as Mr. Vinogradoff adds, is not a *colonus*; 'he is not bound up with any particular homestead or plot of land, but he is considered primarily as a cultivator under manorial organization, and for this reason there is a limitation on the lord's power of alienating him.' Dr. Stubbs has shown us that notwithstanding the existence of so many early records the history of the dependent population is extremely obscure throughout the Norman period. The rustic, as he says, came seldom within the view of the chroniclers of great events. 'The villein possessed no title-deeds by the evidence of which his rights were attested: he carried his troubles to no court that was skilled enough to record its proceedings. It is only by a glimpse here and there that we are enabled to detect his existence; and the glimpses are too uncertain to furnish a clue by which his history can be traced.' When the villein re-appears in the thirteenth and fourteenth centuries he bears marks of the changes which have taken place in his position, which before the Conquest had been one of depression, but not of helplessness. 'When he comes before us in the reign of Richard II. his condition is one which suggests that the three centuries that have elapsed since the Conquest have been for him centuries of continuous decline.' The condition of the slaves, who were mere chattels according to the Anglo-Saxon laws, is clearly distinguished in Domesday Book from that of the dependent freeman: the slaves of this kind disappeared soon after the Conquest, but there can be little doubt that there was a new movement towards imposing a fresh kind of servitude upon the *villani* or men of the township. The intricate variations of the old tenures were disregarded by the Norman landowners, whose habit it was to treat their husbandmen as being bondmen in blood, although Dr. Stubbs has shown that for two centuries after the Conquest 'the *villani* are traced as being in the possession of rights both social and to a certain extent political.' A bold attempt was made to establish the doctrine that serfdom might result from the nature of the services rendered, so that if a freeman were found doing the work of an ordinary husbandman he might be held by

law to have fallen into the condition of a slave. But a long litigation, upon which Bracton made repeated comments, established the humane rule that tenure has no influence on status, and that the land might be in base tenure while the tenant was free. From this point it became practically unimportant to enquire what kind of rustic work was considered to be incompatible with freedom; but questions as to the quality of service still found a place in that doctrine of tenures which divided all lay holdings by means of a grand criterion, according as the services were though uncertain yet not unbecoming to the character of a soldier, or though certain such as a free citizen might well perform, or on the other hand though redeemed by certainty were base and only fit for peasants, or lastly were both base and uncertain, which involved a holding of such a precarious kind that it could hardly be called a tenure at all. Mr. Vinogradoff points out that even in the thirteenth century there were judges and juries courageous enough to maintain, that if a freeman held in villeinage by villein services he could not be ejected by the lord against his will, provided always that he performed the services due from the holding. These statements, as he justly remarks, indicate the future rise of copyhold tenure, although they were certainly premature and inconsistent with several important decisions.

Mr. Vinogradoff shows that there was always a certain remnant of freedom surviving in the tenure of villeinage, which may be treated quite apart from the question of the status of a free tenant of bondland. Sometimes, as he says, it is not easy to determine whether a particular trait should be classed with modern improvements or 'with the remnants of archaic institutions'; he is of opinion, for instance, that the protection accorded to the peasant's wainage, or stock in husbandry, was developed under the influence of Norman ideas; but in a great number of instances it may be clearly shown that the privileges of certain classes among the villeins are the remains of the somewhat scanty liberties of the free labourers of the times before the Conquest. 'The case of ancient demesne is especially interesting in this light; it presents, as it were, an earlier or less perfect crystallisation of society on a feudal basis than the manorial system of Common Law.' It might be possible to explain the varying degrees of freedom which appear in the ancient estates of the Crown by reference to the exercise of a royal prerogative or the necessities of public policy; but it is plain, when the evidence is examined, that the question cannot be understood without going back to a period before the Norman invasion; and it seems likely to involve an enquiry into the position of the settlers upon the folkland before it was treated as Crown property, and of the

tenants on the royal estates before these were organized as manors of the continental pattern. On the whole matter of the investigation into the legal aspect of villeinage Mr. Vinogradoff sums up the general effect of his evidence as disclosing three elements in a complex institution: 'legal theory and political disabilities would fain make it all but slavery; the manorial system ensures it something of the character of the Roman *colonatus*; there is a stock of freedom in it which speaks of Saxon tradition.'

Passing from these broad considerations to an enquiry into the details of the case, he proceeds to analyse a considerable number of documents, so as to show the actual conditions of life among the servile peasantry, 'the distribution of holdings, the amount and nature of services,' and the local arrangements under which the manorial estates were administered. His instances tend to show that everything depended on custom in the mediaeval period, so that even the servile tenants were guarded against the worst evils of slavery; and further that the distinctions of status were much disregarded in practice, the real division of ranks being rather a matter of tenure, as is shown by the ever-recurring contrast between agricultural service and the obligation to pay a money-rent, between the precarious occupation of bond-land and the independent position of a tenant protected by contract or by the ownership of a freehold estate. The payment of rent seems to have been regarded as a badge of freedom, as it certainly was the sign of a privileged position; but it must of course be remembered that we are here speaking of the tendency of opinion, and not of the legal tests between freehold and customary tenure, and also, as is pointed out in the work before us, that land subject to rural work was generally subject to some small rent, while 'in a vast majority of cases rent-paying land retained some remnants of services.'

These considerations make it possible to group the great bulk of the peasantry in two classes, the one containing the ordinary *villani*, the other presenting itself as free, in the sense that 'it is more or less protected by law, and more or less independent of the bidding of the lord and steward.' We see the development of a secure copyhold tenure beginning in the general commutation of labour for money-rents. 'The influence of commutation makes itself felt in the growth of a number of social groups which arrange themselves between the free and the servile tenantry without fitting exactly into either class.' The whole law of status, as the author points out, becomes transformed by the extension of these groups, 'as the law of tenure becomes transformed by the growth of leases,' and the old system based upon customary labour

is changed into a new system based mainly upon contract, although the old forms and shadows of tenure and service remain. We are justified, therefore, in disregarding the artificial division of society into freeholders and villeins, of which so much use was at one time made. We have found classes of half-free tenants, whose history cannot be neglected: and when the evidence is examined we find more and more reason to believe that their comparative liberty was not so much a new creation as a reversion towards the personal freedom which had been enjoyed by their predecessors in ancient times.

The author deals in his second Essay with the details of manorial administration, and describes with special care the open-field system of husbandry, the rules for the distribution of the holdings regarded as composite units made up of scattered and intermixed portions, the origin and growth of rights of common, and the customary varieties of service. All these subjects are copiously illustrated by references to the words of actual records, which clear up many of the difficulties that have hitherto obscured the subject. The term 'grass-earth' is shown to mean a tillage-service reserved in return for additional pasturage; 'gafol-earth' was a service of the same kind, the second syllable however referring to the plough-labour, and not to the soil or ground, as the description in the Essay seems to imply. 'Ben-earth' is a kind of boon-work added to the ordinary ploughing, which was performed, to use Somner's words, '*précairement*, as the Frenchman saith, upon request and summons.' A Gloucestershire survey mentions a 'Rad-acre,' the meaning of which is not explained; but we may suppose that it referred to the tenure of the Rad-men, who 'notwithstanding their freedom, did ploughing harrowing and harvest-work in aid of their lord.' The render of the wood-hen, sometimes described as '*gallina sylvestris*,' is well explained as the hen given for permission to take wood in the forest. Mr. Vinogradoff establishes his view that the 'malmen,' or tenants of 'molland,' were tenants under an ancient rent, and some similar derivation, we may presume, will be found for the officials in a Suffolk manor who were known as the Great and Little Molemen. With respect to another term, occurring in Somerset and some other western counties, we can hardly agree with the explanation offered. 'A curious kind of tenure is the so-called Rofliesland.' The Glastonbury Inquisition of 1189 is cited as to the holding of 'unum Rofliesland,' or land which is 'Rofles,' or 'unum ferdel de Rofliesland,' and there are entries in the later records of the Abbey of Glastonbury as to lands called by similar names. Mr. Vinogradoff remarks that the same word is often found in Wilts and Somerset as 'a Rough lease' or Rowlease,

and suggests that it may refer to an 'informal agreement' between lord and tenant. If the word 'lease,' however, can be evolved out of the ancient name, it would probably be referable to some kind of leaze or pasture. Mr. Vinogradoff rightly refuses to dwell too long on the list of 'strange prestations,' which were imposed on the tenants when money was scarce; 'any reader curious about them will find an enormous mass of interesting material in Hazlitt's *Tenures of Lands and Customs of Manors*.' It is of much greater importance to discuss the degrees of legal and customary freedom enjoyed by the classes of tenantry to which these ancient phrases are applied. One of the principal questions in the discussion relates to the ancient manorial freeholds. If there were many of these, it is urged, it will be easier to overthrow the argument of those who think that the village customs originated in serfdom. To make the enquiry useful we must eliminate some classes from the number of persons called 'Libere tenentes.' We must distinguish between the 'free tenant' and the wider group of tenants who are free men. We must disregard the freeholds carved out of the demesnes and wastes, and the cases mentioned by Bracton where men were enfeoffed in imitation of an older tenure by services of ploughing and reaping, or feeding hounds, or riding with the lord. So we shall omit the Norman variety of free socage, and the privileges of the Crown estates, as well as the numerous cases of freehold tenure created by sweeping measures of enfranchisement. After making all these deductions we shall find, as Mr. Vinogradoff points out, 'that some of the feudal freeholds are ancient freeholds, not liberated from servitude, but originally based on the recognised right of the holders, and that such ancient freeholds were included in the communal arrangement of ownership.' Numerous instances will at once occur to the reader's mind. He will remember the socage tenure of East Anglia, the gavelkind in Kent, the 'drengs' or yeomen in the North, the burgage holdings in many an ancient town. If he refers to Coke he will find an account of certain 'boors' or *co-liberti*, who held from the Conquest onwards by rent in free socage, as appears by matter of record, and of the 'Rad-men,' free tenants in the strictest sense, who worked at the lord's barton or laboured in the fields. The actual history of a free village community can be studied in Mr. Gomme's account of the ancient town of Malmesbury or in the latest blue-book on unreformed corporations. Still we must not suppose that these freeholds were very numerous. Their appearance during the feudal period is admittedly sporadic, though if they were even fewer in number their presence would be quite sufficient for Mr. Vinogradoff's argument. 'The older the evidence,' says Mr. Maitland, 'the fewer the

freeholders : ' and he adds an instructive comment upon the phrase. ' Though it is very possible to believe that the villani of Domesday were free men, it seems impossible to doubt that they were the predecessors in title of the villani of the thirteenth century. It follows that over the greater part of England the Domesday *manerium* has rarely any tenant whose successors in title will be freeholders. Thus far Mr. Seebohm seems to have proved his case, though his reading of yet earlier history cannot be accepted.' This agrees well enough with the rest of the passage from Coke, to which reference has already been made, showing that *servi* was the name of the bondmen at the time of the Norman Conquest, and that ' *villani* in Domesday, often named, are not taken there for bondmen, but had their name *de villis* because they had fermes and there did work of husbandry for the lord.' In the debate about so ancient a subject as the nature of the English settlement in Britain it does not matter very much which of the existing kinds of proof is selected. Mr. Vinogradoff is entitled to say that the appearance of a free element among the peasantry in the feudal age throws the burden of proof on those who support the servile origin of the community ; or, on the other hand, he may justly allege that the privileges and rights subsisting throughout the period of serfdom indicate an earlier stage of freedom. He may appeal to the historical evidence as to the actual condition of the labourers before the Norman Conquest ; in a further instalment of his valuable and interesting work he will probably be able to show that at every stage throughout the historical period there are signs, surviving all changes and introductions of usages from abroad, that the original settlers established themselves in free communities, with collective ownership and a system of co-operative management. So far as he has gone he has made out a strong case against the suggestion that our institutions began with the rule of Roman or Romanised lords over a nation of serfs, and has shown in this first part of his work that ' the communal organisation of the peasantry is more ancient and more deeply laid than the manorial order.'

CHARLES ELTON.

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THE REFORM OF LEGAL ADMINISTRATION :  
AN UNAUTHORISED PROGRAMME.

**T**HOSE who are striving for the Reform of Legal Administration have an arduous task before them. They cannot hope for the zealous co-operation of the profession or of the public. Those of the former who have achieved fame and fortune under the existing system may be excused if they regard it with complacency. Change will confer no benefits upon them. It will not augment their gains, but it may increase their labours.

Reform in other branches of administration may hope to rouse the enthusiasm of the public, to martial popular battalions in support of its schemes, and so in the fulness of time to gain its ends.

But 'legal administration' is too abstruse and technical a subject to commend itself to public attention unless perhaps it is brought before it in a broad and popular manner, freed from the technicalities and the jargon of the law.

Every now and again some forlorn and law-wrecked suitors cry aloud against the cost, the delay, the bewildering confusion of our legal system. The law journals, and perhaps, in the dull season, the lay newspapers take up the cry. A few letters and articles are written. Public interest is roused, and a transient commotion caused in the stagnant legal pool. But Parliament meets, a social scandal promising 'extraordinary revelations' crops up, and the cock-boat of legal reform is submerged in the whirlpool of social chatter and political excitement.

The object of this article is to submit to the public and to the profession a comprehensive scheme of Law Reform, drawn with a very free hand and incumbered with as few technicalities as possible, so that the man in the street may, if he will, run and read.

A volume would be required for the adequate treatment of such a subject. Only a few pages are available. All that can be attempted therefore is to give a broad outline, touching upon the principal points which have of late been so much discussed, and in which the public are most interested, and leaving details alone, for if something like agreement could be arrived at upon main principles, details would to a great extent settle themselves.

The chief grounds of complaint against the existing system are (1) its cost, (2) its delay, (3) its want of finality.



So far there is agreement. When it comes to determining the causes of such cost and delay, there is less agreement, and when the appropriate remedy comes to be discussed, then 'quot homines tot sententiae.' Conflicting interests are to some extent responsible for this. The town lawyers want 'centralization,' the country lawyers 'localization.' But whilst the doctors are disagreeing the patient is showing an inclination to prescribe for himself. 'Ephraim,' he seems inclined to say to himself, 'is joined to idols. Let him alone.' Thus the commercial litigant has already taken the matter into his own hands and become 'rara avis.' What if the entire British public were to adopt this policy of abstention and become, as far as lies in their power, total abstainers, not from liquor but from law.

The legal mind, partly by nature, partly by training, is critical and censorious. The legal life is passed in detecting other people's errors, exposing their weaknesses, and in perpetually testing and cross-examining everything and everybody. Nothing but a serious and common danger could ever induce a body of lawyers to sink their small differences and agree about anything. Perhaps this stimulus to approximate unity is now likely to be forthcoming.

This scheme is a patchwork gathered from many sources. Its foundation is 'compromise,' and it is built up upon the 'old paths' as far as possible.

It is not supposed that this, or any other scheme of reform, will be carried out in its entirety or in the immediate future. All reform affects some group of interests injuriously, and legislation in this country is the result of a contest between very equally balanced forces. 'Give and take' is the rule of the day, and the practical legislator, whilst asking for a loaf, is happy if he gets some crumbs of it on account. Spasmodic tinkering, prolonged through generations, is the normal course of 'reform' in England.

Nevertheless, a road-book of the route he wishes and intends to follow should be useful to the traveller who sets out on this weary journey. It may enable him to note how far each petty legislative success fits in with his general scheme of travel, and to what extent it advances him towards the desired goal.

It will be convenient first to exhibit this scheme as a whole, and then, as far as space permits, to touch upon the points suggested.

- (a) A Ministry of Justice.
- (b) One final Court of Appeal.
- (c) The abolition of Divisional Courts.
- (d) Union of both branches of the profession.

(e) Modification of the assize system. Creation of 'Provincial Centres.'

(f) Modification of existing procedure and practice.

(g) Miscellaneous matter. Chambers, Costs, &c.

#### (A) A MINISTRY OF JUSTICE.

Possibly neither the public nor every member of the profession adequately realizes the magnitude and complexity of the system comprised in the term 'legal administration.' The House of Lords, the Judicial Committee, the Supreme Court, the Central Office, the Bankruptcy Department, the Ecclesiastical Courts, Lunacy Matters, Land Registry Office, the Magistracy, &c., &c., with their innumerable offices and officers, Rules and Orders, are under the control and supervision of one personage, the holder of the Great Seal for the time being. True, this great official is assisted by permanent and experienced officers, but the ultimate responsibility for everything done, or left undone, rests upon his shoulders.

If the Lord Chancellor could devote the whole of his time to administering the vast system of which he is the head, he might do much in the direction of reform. But he is a leading member of the Cabinet, Speaker of the House of Lords, and he requires some measure of rest and refreshment. Then just as he is beginning to gather the innumerable threads of administration into his hands, the political situation changes, and he ceases to have an effective voice in the control of the measures of reform which he may have initiated. Under such circumstances anything like continuity of policy is impossible, and you get in its place an intermittent patchwork legislation, first in one direction and then in another.

Politics have ever been the bane of Law Reform. The holders of the Great Seal may be likened to intellectual Samsons, whom the Delilah of politics has ever tempted aside from the narrow paths of professional duty. For centuries the splendid abilities of such men as Somers, Cowper, Hardwicke, and others who have fought their way to the 'marble chair,' have been frittered away in compassing transient political victories, instead of being devoted to the nobler ambition of reforming the administration of the law.

Some day, but not yet, the nation will ask itself what connection beyond a traditional one is there between law and politics. Also, why the Department of Justice, which would seem to be the most important of all, should be less carefully organized and equipped than other great departments of the state. In those days perhaps some such scheme as the following may be slowly evolved.

(1) A Ministry of Justice. President, the Lord Chancellor, permanent, if possible, and relieved from all political duties. He would be assisted by,

(2) A Board of Judicature, consisting of three divisions—namely,

(a) A Council, consisting of persons who had held or held ‘high Judicial office’; of certain Judges of the High Court and of the District (County) Courts;

(b) A General Committee, consisting of—the Attorney- and Solicitor-General, members elected by the Bar-Committee; members elected by the Incorporated Law Society, Solicitors chosen from each of the large towns, some Presidents of the Chamber of Commerce, and certain officials (Masters and Chief Clerks);

(c) Department of Justice, consisting of the permanent Secretary and staff, and divided into the three sub-departments:

(1) the Judicial department, (2) the Rule department, (3) the Official department.

Space does not permit further detail (although such details have been carefully worked out by a very practical official at the head of a department in the Central office), but it is submitted, that a scheme running upon some such lines as these would, even if the Chancellor’s position were not permanent, secure an organized supervision of every department, and would go far to secure continuous and progressive reform. The judicial and conservative element in the Council would be balanced by the reforming tendency in the General Committee, the members of which would be in touch with the mercantile and general public.

#### (B) ONE FINAL COURT OF APPEAL.

This is the very key-stone of the arch. It is by far the most important of all the questions under discussion. Multiplication of appeals is responsible for more cost and delay and causes more annoyance to suitors than any other point of procedure. The reformers of 1872 grasped this fact firmly. They saw that the majority of litigants wanted to get their cause *finally* disposed of by a competent tribunal as cheaply and speedily as possible. Therefore they made the constitution of a strong court of final appeal the principal feature of the Judicature Act, 1873. The House of Lords, so far as English appeals were concerned, was abolished as a Court of final appeal. But in 1874, before the Act of 1873 came into operation, there was a political change. Lord Cairns succeeded Lord Selborne, and (1876) the appellate juris-

diction of the House of Lords was restored. Thus this beneficent enactment, upon which all the most distinguished lawyers of the day were agreed, was repealed before its efficacy had ever been tested.

There are delicate questions of law upon which the greatest lawyers will differ. In such cases all that is required for practical purposes, indeed all that can be in any wise obtained, is the decision of a *majority* of competent Judges.

The main object therefore of the Law Reformer should be to obtain this opinion of the majority as cheaply and as speedily as possible. The ordinary litigant does not in the least care about ideal justice. He is insensible to the glory of having his name associated with a leading case, or of having it embalmed in the Law Reports. His desire is to beat, or be beaten by, his adversary as quickly as possible, and to have done with the matter. A suitor with a long purse, who is anxious to postpone the final decision of the action, may now drag his adversary, from a Master to a Judge, from a Judge to a Divisional Court, from a Divisional Court to the Court of Appeal, from the Court of Appeal to the House of Lords; a torture enduring for about three years. This is rare. The more usual course is that after a case reaches the Court of Appeal, which may take about a year or eighteen months, one of the parties appeals to the House of Lords, and what then frequently happens may be illustrated by a recent case. In *Meyor v. Decroix* (1891) A.C. 520, a special case was decided in favour of the defendant by two Judges, Cave and A. L. Smith J.J., sitting as a Divisional Court. In July, 1890, the Court of Appeal, Lord Esher M.R., Lindley and Bowen L.JJ., reversed that decision and gave judgment for the plaintiff. In July, 1891, the House of Lords, Halsbury C. and Lords Watson and Herschell, affirmed the judgment of the Court of Appeal, Lords Bramwell and Morris dissenting. Thus the judgment of six Judges eventually prevailed over that of four.

Now precisely the same result might have been obtained one year earlier and at probably half the cost, if the three Judges of the Court of Appeal could have sat together with the five Judges of the House of Lords.

But sometimes the result is even less satisfactory to the suitor. It has happened that the House of Lords has been equally divided, and the judgment of the Court of Appeal has therefore stood, all the expense of the appeal to the House of Lords being entirely thrown away (the 'Duke of Buccleuch,' L.T. 1891, 168).

There are two simple methods by which this most urgent reform might be brought about.

The five members of the present Court of Appeal, who are not members of the House of Lords, might be raised to that dignity as 'Lords of Appeal in Ordinary.' The present Court of Appeal would then cease to exist. All appeals, final and interlocutory, would then lie direct to one great final appellate court,—the Queen in her High Court of Parliament.

This final Court of Appeal would consist of three divisions: (1) The House of Lords Division, sitting at Westminster, and composed of the same judges and hearing Scotch and Irish appeals, as at present. (2) The Judicial Committee division, sitting at Westminster as it now sits. (3) The third division would sit at Westminster, and would consist (supposing Divisional Court to be abolished) of three sub-divisions.

The arrangement of Courts and Judges would be as follows:—

#### COURT OF FINAL APPEAL.

- (1) House of Lords Division, sitting at Westminster.
- (2) Judicial Committee Division, sitting at Westminster.
- (3) Lords of Appeal, three divisions, sitting at the Royal Courts, thus:—

- (a) Lord Esher, Lords Bowen and Fry—(Final Queen's Bench and Admiralty).
- (b) Lords Lindley, Lopes and Kay—(Final Chancery, Probate, Divorce, Lunacy).
- (c) Lords Coleridge or Hannen, Mathew and Smith—(New Trial, Interlocutory Appeals, Crown Cases, Bankruptcy Appeals, County Court Appeals).

The advantages of such a scheme are these: The Judges, being of equal rank, would be interchangeable. If there was pressure in one of its divisions, the Judges of another division might assist it. If Appellate work was slack, the Appellate Judges being all Judges of the High Court, could assist their brethren in that Court.

Cases of great importance or difficulty would be heard by two or more divisions of the Court, sitting together 'in banc' at Westminster or at the Royal Courts.

The suitor would then get in one year the same decision which it now takes him, sometimes, three years to get, and this at a minimum of cost. All litigation would be finally concluded within eighteen months.

All procedure and practice cases would go direct to the third division of this final Court, securing uniformity of practice.

The jurisdiction of the House of Lords would remain untouched. This scheme would not therefore be open to the objections which wrecked that of 1873.

It would not affect injuriously any existing interests. The House of Lords would be benefitted by the accession to its ranks of so much ability, and to all outward appearance the course of justice would continue on its present footing. But the benefit to the public would be beyond price.

It would probably be found desirable to report only the decisions of this final appeal Court. Much suffering would thus be saved to the profession.

The following alternative course (suggested by a well-known official in the central office) might be adopted. Leaving the Final Courts of Appeal (House of Lords and Privy Council) as they are, and also the present Court of Appeal, give power to any appellant or respondent in the Court of Appeal to demand *as of right* that the appeal be entered and heard as a *final* appeal. Enable either party then to require that such final appeal be heard by five Judges instead of three. Make all persons, holding or who have held high judicial office, liable to be called upon by the Lord Chancellor to assist at the hearing of such appeals, and give the Court of Appeal, so sitting as a Court of final appeal, the same position as to judgments and precedents cited before it as the House of Lords would have had on the hearing of such appeal.

#### (C) THE ABOLITION OF DIVISIONAL COURTS.

It seems to be generally agreed that these Courts might be abolished with advantage to all concerned. If the scheme hereinbefore suggested of a Final Court of Appeal were adopted, all the appellate functions now discharged by Divisional Courts would be undertaken by the third sub-division of division 3 of the Final Court of Appeal.

#### (D) THE UNION OF BOTH BRANCHES OF THE PROFESSION.

This reform is a necessary part of any scheme intended to diminish the cost and delay of litigation. The *Times* and the present Solicitor-General are among its foremost advocates, but it numbers many supporters in both branches of the profession.

But here we meet with the stumbling-block which so often stands in the way of legal reforms. The interests of the most influential members of the profession are opposed to any change. Nearly every large firm of solicitors has a relative at the Bar. Almost every successful barrister owes his position to his connexion or influence with solicitors. If, therefore, this change is to be brought about, it must be by the efforts of those members of the profession

who have their wits and their industry alone to trust to, assisted by the public and the press.

It speaks well for the general standard of morality throughout the profession that this most pernicious system should have existed for centuries without wrecking the *moral* character of every one of its members. This it certainly has not done, but its tendency is towards demoralization.

The struggle for existence at the Bar is intense. Many needy men crowd to it for a livelihood. Industry and intellectual power may achieve a bare competency. But for anything beyond this the 'patronage' of the other branch is indispensable. It may be that the 'horrible artifices' referred to in the letter of 'Stuff Gown' (*Times*, 3 or 4 Jan. 1892), and in which the writer sets out in shocking detail the various forms taken by the detestable vice of 'huggery,' are employed only by a few. But the question is, does this system 'make' for professional righteousness or its opposite? Consider its effect upon solicitors. The wisdom of our legislators has determined that the recompense of a solicitor for his professional labours shall depend upon the length of the proceedings in which he is engaged. A direct inducement is thus held out to him to multiply difficulties, instead of avoiding them. But further, if a solicitor ventures to act upon his own opinion in the conduct of a case, he runs the risk of an action for negligence. If, on the other hand, he takes counsel's opinion (at the cost of his client), he is free from all responsibility. It follows that the more he employs counsel, and the more counsel he employs, the heavier becomes his balance at his banker, and the lighter his responsibilities. Then suppose that he has a son or other relative at the Bar. In what direction will his business gravitate? Will it tend to lessen his appreciation of the advantages to be derived from obtaining counsel's opinion and assistance on any and every occasion if he knows that the cost of them will come out of his client's and go into his relative's pocket?

It is idle to discuss further the working of this fantastic survival from the dark ages of the profession. No one wishes that all members of the Bar should be compelled to act as solicitors, or that all solicitors should be forced to undertake advocacy. All that is demanded is, that there should be absolute freedom of action; that members of both branches of the profession should be free to follow the course which, in any particular case, they may think to be most for their client's interest and their own, and should be free to act as solicitors or advocates, or in both capacities, whenever they so choose.

(E) MODIFICATION OF THE ASSIZE SYSTEM. PROVINCIAL CENTRES.

It is generally admitted that some modification of the assize system is necessary. But there is much conflict of opinion and interest as to the nature and direction of the proposed change. The following scheme, which follows generally the lines of Mr. Pitt-Lewis's Bill, seems to offer a reasonable compromise :—

(1) Certain County Court Districts—perhaps those which are identical with those of the District Registries of the High Court, to be made Districts of the High Court. Palatine Courts to be Districts of High Court, with special provisions as to Judges, &c.

(2) The present County Court Judges in such districts to be 'District Judges of the High Court;' to be eligible for appointment to the High Court bench after a certain time; to assist High Court Judge in trial of certain assize business; with a saving as to Palatine Courts.

(3) The jurisdiction of Registrars (County Court) to be increased, say to £20 or to any amount by consent. Registrar to be eligible for appointment to District Court bench. Procedure before Registrar to be very simple and summary.

(4) The Judges of the High Court to hold assizes at certain large towns: also to attend other places on the circuit when there appears to be business of sufficient importance to require such attendance.

(5) The jurisdiction of District Courts to be unlimited in amount, and all action to commence in such Courts.

(6) Appeals from District Courts to be direct to final Court of Appeal.

(F) MODIFICATION OF PROCEDURE AND PRACTICE.

It is certain that much cost and delay would be saved if some such re-arrangement of Courts and Judges as that above suggested could be carried out.

But the 'quantum' of such saving would depend greatly upon the arrangements with regard to procedure and practice which accompanied it.

Without making an idol of uniformity, it appears desirable, if possible, to have one *normal* code of procedure for all actions, but to leave much discretion in the hands of the Judge. The leading object should be to *get the litigating parties to trial as speedily as possible, and to discourage interlocutory applications.*

(1) Every action (subject to County Courts Act 1888, s. 84, as regards the metropolis) should be brought in the district in which



the plaintiff (? defendant) resides. The Judge of the High Court or District Court should have power to transfer actions to Divisions of High Court.

(2) Every action should commence with writ, endorsed with short statement of nature of claim.

(3) In actions over £20, plaintiff should be at liberty with writ, or at short date after appearance should be obliged to serve defendant with affidavit of claim. Full particulars of claim to be set out in such affidavit.

In actions under £20, and which are to be tried by the Registrar, no affidavits should be required, but after appearance summons for judgment.

(4) Defendant to put in affidavit of defence with full particulars.

(5) Summons for judgment, or directions before Judge. If judgment not ordered, all or some of the following directions to be given:—(1) for discovery of documents, (2) for interrogatories, (3) issues to be settled, mode and place of trial fixed. (Interrogatories are unknown in Scotland. If retained they should be allowed only in special cases and after copy submitted to Judge and opposite party.)

(6) Trial by High Court Judge, or by District Judge with assessors (accountants, &c.), or with jury, to be plaintiff's right in certain cases.

(7) Where parties agree to state issues of fact or law, no writ or affidavit should be necessary. Only a concise special case which should set down to be heard.

(8) Third party process should be abolished.

(9) The summary proceedings under O. 14 should be retained, and perhaps the powers of specially endorsing a writ extended.

The above is of course the merest roughing out of a scheme of practice. The idea is to make the ordinary action run on the simplest and most inexpensive lines, but to leave power with the Court to adopt, in cases in which it may think it necessary, a more elaborate procedure.

#### (G) MISCELLANEOUS MATTER.

*Chambers.*—All applications of importance at Chambers should be adjourned to the Judge, and the appeal from his decision should be straight to the final Court of Appeal. (Division 3, sub-division 3.) The costs of an unsuccessful interlocutory application at Chambers should, as a rule, be thrown on the applicant, and not made 'costs in the cause.' The costs should be assessed at once, by the Master or Registrar, &c., and be payable immediately.

A scheme of this kind would give the 'uncommercial' litigant substantially the same advantages which the scheme of the 'Joint Committee' proposes to give to the commercial litigant. And it would avoid the difficulties which would arise from arbitrarily dividing suitors into two classes, commercial and uncommercial, and providing for the wants of the former, whilst leaving those of the latter untouched.

Want of space makes it impossible even to touch upon many other questions of great importance, such as the costs of plaintiffs, the retirement of Judges, and other matters.

All that is claimed for this rough sketch is that it contains the backbone of a procedure which would give English suitors a right never yet enjoyed by them, namely, the certainty of having their actions finally decided by a competent tribunal within eighteen months of the issuing of the writ, and this at a minimum of costs.

THOMAS SNOW.

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## MALICE IN THE LAW OF TORTS.

IT is a matter of common learning that, as a general principle, the Law of Torts disregards motive as distinguished from intent. Further, that doing what the law forbids, or failing without lawful excuse to perform a duty imposed by law, is equivalent to intent. A man is responsible for the negligence, i.e. an act of omission causing harm, though unintended, which due diligence might have prevented.

But it must be conceded that there are established exceptions to the general rule regarding the irrelevancy of motive, wherein liability depends not merely on intent, or negligence (accompanied of course by damage), but in part on the indirectness of the motive influencing the tort-feasor.

This conception of indirect motive is commonly expressed by the word 'malice,' which probably has been imported into the law of private wrongs from the law of public wrongs or the criminal law. It would be outside the scope of this article to consider whether this conception of malice is, or is not, of any practical advantage in the law of crimes. It is noticeable, however, that it only occurs twice in the Indian Penal Code, certainly the most successful piece of criminal legislation with which I am acquainted—a code consisting of 511 sections. In both the sections (ss. 219, 220) in which the word 'maliciously' occurs, its presence seems due rather to oversight than to anything else, as (1) it is not in the least necessary where it occurs, and (2) the framers of the code have entirely excluded it from those sections in which, following the English law, it would naturally appear. The 'malice aforethought' of the criminal law of England appears as 'intention' and 'knowledge' in the Code. The term 'malignantly,' curiously enough, also occurs twice (ss. 153, 270). But it, too, might be struck out without detriment to the Code as a whole.

Indirect or evil motive, then, is indicated by the word 'malice,' or, as it is sometimes styled, 'express malice.' What is known as implied malice or malice in law is not malice in any proper sense of the term. Lord Campbell calls the latter a 'conscious violation of the law to the prejudice of another' (9 C. & F. 321), which is no more than saying that it is an *intended* violation of the law. This definition, with unimportant variations, occurs frequently in the Reports.

What then is express malice? 'Malice in fact,' says Pollock C.B. in *Sherwin v. Swindall* (12 M. & W. 788), 'is of two kinds, namely personal malice against the individual, and that sort of general disregard of the right of consideration due to all mankind which . . . .' It has been variously described as 'indirect or improper motive,' *Hicks v. Faulkner* (8 Q. B. D. 175). The same expression occurs in *Mitchell v. Jenkins* (5 B. & Ad. 595): 'Motive other than an honest desire [to bring a criminal to justice].' *Abrath v. North Eastern Railway* (11 Q. B. Div. 443): 'indirect or illegitimate motive,' per Lord Bramwell (S. C. 11 Ap. Ca. 251). 'Malice' has been held to be equivalent to 'with motive' by Crompton J. in *Lumley v. Gye* (2 E. & B. 224): while in America a malicious act has been described as 'any unlawful act done wilfully and purposely to the injury of another' (Hilliard on Torts, i. 446). But it seems unnecessary to multiply authorities.

For the present we may take malice as some motive morally reprehensible. The cases in which it is said to form a necessary ingredient in an actionable wrong are comparatively few. They fall naturally enough into certain groups, which we shall have to consider somewhat in detail.

And first of what is called an action for a 'malicious prosecution.' I said groups a moment ago for this reason, that allied to the action for malicious prosecutions are several other actions such as those for maliciously exhibiting articles of the peace against another; maliciously causing a search warrant to issue; for malicious proceedings in bankruptcy, and a few others. These are all more or less analogous to the action for a malicious prosecution, and the observations to be made on this last will apply generally to them.

To support an action for a malicious prosecution, besides the fact that the proceedings terminated in plaintiff's favour, it is necessary for him to show (1) that those proceedings were instituted without reasonable and probable cause, and (2) that they were the result of malice; *Abrath v. North Eastern Railway Company* (11 Q. B. Div. 440). Reasonable and probable cause is a question to be settled by the judge; see Pollock C.B. *Busset v. Gibbons* (30 L.J. Ex. 77): and it has been said that if, in the opinion of the judge, there was no reasonable or probable cause for a prosecution, the jury might infer malice. This rule, that 'malice might be implied from the want of probable cause, without proof of angry or vindictive motive,' has been followed in America (see Hilliard on Torts, i. 420). But it would seem (see *Abrath v. North Eastern Railway*) that generally some proof of malice, i.e. express malice, as distinct from want of probable cause, must be forthcoming. The former view would seem a *reductio ad absurdum* of the theory of malice. For if a total want

of probable cause is not sufficient alone to found an action, it seems odd that it should be held sufficient, because it suggests the existence of something else, of which, *ex hypothesi*, there is no independent proof whatever.

In his charge to the jury, approved by the Court of Appeal, Cave J. (11 Q. B. D. 442) distinctly says, 'It was for the plaintiff to establish the want of reasonable and probable cause, *and malice*.' Further on he discusses the question of belief: 'If I go before a magistrate with a case which appears to be good on the face of it, and satisfy the magistrate that there ought to be a further investigation, while all the time I know the charge to be groundless, then I should not have reasonable and probable cause . . . if you think that the defendants did not take reasonable care to inform themselves of the facts of the case, or that they did not honestly believe the case which they laid before the magistrates, then in either of those cases you will have to ask yourselves this further question, were they in what they did actuated by malice . . . .' It would appear then that 'probable cause' at law is made up of three elements, (1) evidence of the guilt of the accused, (2) reasonable care in the sifting of that evidence, (3) belief in its truth: and that it is only when one of these is disproved that the question of malice need be gone into. It seems deducible from some of the observations of the learned judge that he considered the admixture of any motive 'other than a sincere wish to bring a supposed guilty man to justice' would constitute 'malice.' But there is certainly authority, as we have already said, for the proposition that 'malice' may be inferred from the want of probable cause; see *Johnstone v. Sutton* (1 T. R. 545), *Mitchell v. Jenkins* (5 B. & Ad. 594). In a recent case, *Hall v. Venkatukrishna* (13 Mad. 394), the courts below had found that there was no probable cause, and this finding was final. The High Court, however, sent down the case for a finding on the question of defendant's belief, which being found in his favour, plaintiff's suit was dismissed.

The question naturally arises, belief in what? From the language of many of the decided cases it would appear to be a belief in the guilt of the accused. Indeed, this expression occurs in *Hicks v. Faulkner* (8 Q. B. D. at p. 171), though 'probably guilty' is immediately afterwards substituted. A man may prefer a charge either on the foundation of what he knows or what he suspects, *Davis v. Noake* (6 M. & S. 31). An Irishman in New York is said to have refused to plead 'guilty,' or 'not guilty,' until he had heard the evidence; and it seems impossible to demand of a prosecutor a belief of more than this, namely, that he has a good *prima facie* case on which to take proceedings. That the law concerning malicious

prosecutions has now been authoritatively settled by the highest tribunal in the land—*Abrath v. North Eastern Railway* (11 Ap. Ca. 247)—is beyond question. But, if it is not over presumptuous to ask the question, is this statement of the law altogether consonant with principle? The extreme solicitude of the law where property is concerned is known to everyone. The smallest conceivable interference with the rights of another (*Meriton v. Combes*, 9 C. B. 972) may amount to a trespass and be actionable. It is actionable if my hat being blown off on a gusty day I follow into my neighbour's field to recover it. Nay, it is submitted, the mere alighting of my hat in his field would itself render me liable to an action<sup>1</sup>. If A has 'no reasonable or probable cause' (taking these words in their ordinary sense) to prosecute me before a Court and thereby puts my character in peril, consumes my time, wastes my money, and generally harasses me, why should I (as in the *Madras Case*) be driven to prove the absence of something from his mind, videlicet belief, before being able to get satisfaction for the damage done me? Or why, to put it otherwise, should his ignorance, or his prejudice, or his intolerable stupidity be an answer to my claim? If it is shown that there was not any reasonable cause, i. e. cause which a reasonable man would take action upon, for the prosecution, and the defendant has acted through ignorance, should not his blunder (in the language of Lord Bramwell in *Huntley v. Simson*, 27 L. J. Ex. 137, 2 H. & N. 600) be regarded as 'one of those blunders for which the man who commits it should be punished, as it is very likely that the person charged with felony through the blunder will, as long as he lives, be sometimes asked whether he had not been had up before a magistrate for felony?'

Another objection to the present doctrine of malice which may well be urged is the extreme difficulty of applying it. A man's acts generally afford an indication of his 'intention.' Nor is there, as a rule, much difficulty in proving 'knowledge.' In the case of 'negligence,' we have to compare a man's acts or omissions with some standard, not often a matter of exceptional difficulty. But who will estimate 'motives,' complicated as they may be and mixed of various ingredients and in all proportions? It is too easily assumed in this connection that a man institutes a prosecution either with the object of vindicating the law or from a mere desire to injure the accused, in other words that his motive is one and indivisible. But this position is not maintainable. We are thus finally driven upon some theory of 'main motive' or 'master

<sup>1</sup> [I must be allowed to doubt the first of these propositions and dissent from the second.—Ed.]

from Titius, her inferior in birth, station, and breeding. Lucilia's brother, Marcus, knowing Titius to be a man of bad character, persuades Lucilia to break off the match. Shall any law founded on reason say that Marcus is liable to an action at the suit of Titius? Assuredly not.' Probably everyone would agree that Marcus, in giving such advice, was only fulfilling a high moral obligation. But let us alter the case a little and put it thus. Lucilia has accepted an offer of marriage from Titius, her equal in birth, station, and breeding. Lucilia's brother, Marcus, knowing Titius to be slovenly in his dress, a bad shot, and given to trumping his partner's best card at whist, and honestly disliking the prospect of a brother-in-law with these characteristics, persuades Lucilia to break off the match. 'Shall any law founded on reason say that Marcus is liable to an action?'

Suppose, again, Marcus dislikes Titius for reasons which he cannot define, and simply gives his sister Mr. Punch's celebrated advice to those about to marry, and she acts upon it. Or, to go a step further, suppose all Lucilia's brothers and sisters advise her to the like effect, each for reasons peculiar to himself or herself, will Titius have an action against them all? If so, we ultimately come to the 'manifest absurdity,' as Coleridge J. calls it, *Lumley v. Gye*, of 'attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind more or less honestly, more or less powerfully, and to make them responsible civilly for the consequences of what, after all, is his own act.' But then, perhaps, it will be said that neither *Lumley v. Gye*, nor *Bowen v. Hall* would cover cases of breach of contract to marry. No such limitation, however, it may be answered, can be put on the general expressions used by the judges who formed the majority in the former case, nor does it appear how such a contract could be excepted from the rule laid down in the latter.

Let us consider for a moment the broad principle. What, we may well ask, is there in the relations between the parties to any contract (outside such contracts as are admittedly within the Statute of Labourers) which warrants the giving to either of them, in case of breach, a remedy wholly outside that contemplated by themselves? Who, on entering into a contract, ever thinks of looking beyond the ability of the other party to perform his part, his integrity, and his solvency to answer in damages in case of default? This form of action is admittedly anomalous<sup>1</sup>. Is it

<sup>1</sup> [I for one cannot admit this, unless the whole class of actions for loss of service, and the very old action of trespass for intimidating servants or tenants at will, are to be called anomalous too. See F. N. B. 87 N, and other authorities collected, Pollock on Torts, 2nd ed., 212.—Ed.]

necessary? It is thirty-eight years since *Lumley v. Gye* was decided, and there seems but a single reported case, *Bowen v. Hall*, which directly follows it. Can this be accounted for by the uncertainty of the principle enunciated therein? Considering the weight which should be given to the opinions of dissent in each of those cases, it may not be altogether presumptuous to question the reasonableness of the rule enunciated in them. In any case, whether such an action is rightly held to lie or not, the conception of *malice* is much beside the question. If such an action lies at all, it can better be founded on 'intention' and 'notice,' i.e. 'that the defendant, at the time he counselled the breach of the said contract, well knew . . .'

From *Lumley v. Gye* we come naturally to that somewhat curious class of cases wherein some interference in trade, or the exercise of legal rights, forms the groundwork. In these malice or improper motive is generally held to be an essential part. In *Rogers v. Rajendro Dutt* (8 Moo. I. A. 103), the Judicial Committee declined to say whether, if the act complained of—a general order by a superintendent of marine to Government pilots that a particular steam tug should not be allowed to tow any vessel in their charge—had been done maliciously, it would make any difference.

That there is such a thing as unlawful competition in trade is wholly beyond dispute. Fraud, intimidation, obstruction, and molestation are all forbidden by law. In this connection reference may be made to well-known cases of *Tarleton v. McGawley* (Peake 270), *Gregory v. The Duke of Brunswick* (2 M. & G. 205), *Keeble v. Heikeringill* (11 East. 574, n). This last case is somewhat curious. It appeared that defendant, who himself owned a decoy, had wilfully frightened away wild-fowl for plaintiff's decoy, thus causing him damage. Holt C.J. expressly treats the ownership of a decoy as 'a trade,' and compares defendant's position to that of a school-master who deliberately frightens away the scholars from his rival's school. It is a noteworthy fact that the word 'malice' does not occur in the declaration in this case as reported, and but once in the judgment of Lord Holt.

The question what amounts to unfair competition was discussed at length in the recent case of *The Mogul Steamship Co. v. McGregor* (23 Q. B. Div. 598). There the defendants, with a view to obtaining for themselves a monopoly of the homeward tea trade from China, and thereby keeping up freights, formed themselves into an association, offering to such merchants and shippers as shipped their tea exclusively in defendants' vessels a rebate of five per cent. on all freights, and refusing a rebate to any shipper who employed a non-association vessel. Provision was also made, in case of



necessity, for conveying tea at any freight, so as to render competition with the association almost impossible. The plaintiffs, who were rival shipowners engaged in the tea trade, were excluded by defendants from all benefits of the association, and sustained damage in consequence. The majority of the Court of Appeal held that as the object of defendants was to benefit the association by keeping the trade in their own hands, and not through personal ill-will or malice to injure the plaintiffs, the action could not be maintained. The case turned chiefly on what is, or is not, a legitimate exercise of trade, and whether the acts complained of did or did not evidence a malicious intention of doing some detriment to plaintiffs' business without just cause or excuse.

But it is difficult to see how malice, save in the sense of a wilful infringement of a right (in which case the word is unnecessary) can possibly form an element in what, for want of a better term, may be called 'unfair competition in trade.' How can motive in such case be determined? Is it to be said that a given interference with the trade of another is lawful if the act is done for the object of personal gain, but unlawful if done with the object of causing loss to a rival? 'To say that a man is to trade fairly,' says Bowen L.J. (23 Q. B. Div. 615), 'but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection.' The attempt to distinguish the two at law—morally no doubt they are distinguishable—seems to me about as reasonable as to make it a rule of billiard pool that a 'life' if taken with the object of increasing the striker's score counts, but that it does not count if the object be to keep down the score of an opponent. In truth the great game of Trade must be played, like all other games, in accordance with intelligible rules. Such rules are as necessary in the one case as in the other. Those applicable to trade have been already incidentally referred to. An exhaustive statement of them here is not necessary even if it were possible. You must not molest; you must not threaten or intimidate; you must not annoy or obstruct; you must not mislead by fraud or misrepresentation. All these are well-known rules, and they imply rights the infringement of which may be made the foundation of an action. They all seem to me to disregard motives, and to be concerned with overt acts or omissions. At whist the misleading your adversaries is a recognised part of the game. But it must be done subject to rule, and any attempt to do it otherwise subjects the offender to condign punishment. But motive, I repeat it, enters not at all into such cases. Why should it do so in Trade? If it be said that the public at large has a deep interest in trade and none at

all in whist, I would reply that it has yet to be shown that any trade association can, in the long run, by combination affect the interests of the public. 'I do not know,' says Coleridge C.J., 'except in the case of *Lumley v. Gye*, that it has ever been held that the same person, for doing the same thing, under the same circumstances, with the same result, is actionable or not actionable according to whether the inward motive was selfish or unselfish for what he did.' *Bowen v. Hall* (p. 344). *A fortiori*, it may be added, liability should not be made to depend on whether that inward motive is legitimately or illegitimately selfish.

The last case, in which malice is said to form a part of the cause of action, to which I shall refer, is the action for 'Slander of title,' a form not very common in our Courts. This action is founded on the loss caused to plaintiff by defendant's falsehood, and, it is said, an essential ingredient therein is malice; *Pater v. Baker* (3 C. B. 861, 868), *Steward v. Young* (L. R. 5 C. P. at p. 127). But why? If defendant, without justification, depreciates plaintiff's property and causes him damage, might not this be made the foundation of an action without the introduction of the idea of malice at all? In fact in a case just cited, *Pater v. Baker*, it was said that 'a jury may infer malice' from the absence of probable cause. Surely the logic of this cannot be supported. Its tendency to confuse a jury is obvious. They are told that unless the defendant acted maliciously the plaintiff cannot recover. It is then explained to them that 'malice' is used in a variety of senses, some of which are far removed from that which the term imports in everyday speech. They are finally told that they may 'infer' the presence of this rather mysterious quality from the presence of something else. Would it not be simpler to say at once 'The disparagement without lawful excuse, of a man's title to his property is actionable, provided damage follows.'

Little remains to be said by way of summing up. Motive, which is all-important in morals, has properly no place in the law of Torts. The cases in which it has been ruled otherwise are admittedly exceptional, and it may be added more or less anomalous. The term malice, with all respect for certain *dicta* to the contrary, is in the last degree obscure and misleading. At first denoting hatred or personal ill-will, it loses by degrees its original meaning, till at last it reaches its vanishing point in its identification with 'intention' and 'knowledge.'

To determine motive accurately is no easy matter when a man looks inward upon himself. Varying an ancient saw, it may be said that it is a wise man who understands his own motives. Still greater are the difficulties when he seeks to determine those of his

neighbours ; while they become almost insurmountable when he seeks to fix the motives of a company, voting, it may be, by a majority of its directors.' Motives, again, are often so mixed as to defy analysis. The rulings which have been discussed might, it is submitted, be supported without any reference whatever to malice or indirect motive. Even in *Lumley v. Gye*, which I have ventured to suggest was not well decided, Willes, a great lawyer (afterwards Mr. Justice Willes), in argument puts the whole matter in one pregnant sentence: 'The averment of malice can make no difference. If the action does not lie without malice, it does not lie with it.'

W. E. ORMSBY

(Judge of the High Court, Travancore).

[Since this article was corrected for the press the decision of the C. A. in the *Mogul Steamship Co.'s* case has been unanimously affirmed by the House of Lords, '92, A. C. 25, and on the same grounds.—ED.]

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## REGISTRATION OF TITLE AND FORGED TRANSFERS.

RIGHTLY or wrongly, and I suppose it must be taken to be wrongly, the general public, and even, speaking generally, lawyers, have hitherto assumed that the essence of Registration of Title, was the non-necessity of making any enquiries when once a certificate of proprietorship was issued, whether by the land registry or by railway and other companies. This assumption has, however, been somewhat rudely broken in upon, as to land, by the recent decision of the Privy Council in the case of *Gibbs v. Messer* on appeal from Victoria, and as to stocks and shares, by what has been done, rather than by what has been decided, in what is popularly known as the *Barton* case. The facts of the *Gibbs* and *Messer* case were shortly these. Mrs. Messer, a lady who resided in Scotland, but who possessed land in Victoria, the title to which was registered under the colonial system, gave her husband a power of attorney enabling him to sell or mortgage. The husband joined his wife in Scotland, and left behind him in the colony in the hands of his solicitor the power of attorney and the certificate of his wife's title. The solicitor forged a conveyance, by the husband as attorney, to a fictitious and non-existent person, and got that person registered as proprietor. He then forged a mortgage, by the fictitious and non-existent person, to real and existent persons, and after some difficulty that mortgage was registered as an incumbrance on the title of the fictitious and non-existent person. Subsequently the frauds were discovered, and Mrs. Messer took proceedings to have herself re-registered as proprietor of the land freed from the registered mortgage. The Victorian Courts ordered that she should be so re-registered, and that the mortgagees should be repaid their money out of the insurance fund which is established in Victoria for the purpose of providing compensation in cases of fraud. Mr. Gibbs, the Registrar in Victoria, objected to the order so far as it affected the insurance fund, and the Privy Council on appeal sustained his objection, the result being that the mortgagees lost their money and had to pay all the costs. The principle on which the decision proceeded is familiar enough. Its application was what is startling. It is held that as the mortgagee parted with his money in exchange for the forged mortgage, he is not entitled to the benefit of the subsequent registration of that mortgage, notwith-

standing the fact that the Registrar was induced to register, by the fraud, not of the mortgagee, but of the solicitor. It would not become me to argue that the decision was wrong, but I may be permitted to say that if the law is allowed to remain in that state, Registration of Title becomes a farce. Technically, no doubt registration takes place at the request of the mortgagee, but really it is done for the mortgagor. If otherwise it would only be necessary to delay paying over the mortgage money until the mortgage has been registered, and registered not by the mortgagee but by the mortgagor, and then the mortgagee would be safe. This, however, is not the ordinary course of business, although it would only be working out in detail, what in fact is the result of the present system, but it would prevent its being said that the transaction was completed by exchanging the money for the forged instrument, and so tainting the title of the mortgagee, with the forgery which he knows nothing about.

The *Barton* case was another case of forgery and fraud, with even more startling consequences than those in the *Messer* case.

Barton, who was owner of stocks in the London & North Western Railway Co., died leaving a will, of which he appointed his widow and Thomas Barton executors. The will was proved and registered by the Company. The widow and Thomas Barton were therefore in a position to sell the stock which stood in the name of the deceased. Thomas Barton caused the stock to be sold, and to the transfers he forged the signature of the widow, adding of course his own genuine signature. The transfers were registered, and for some ten years or more the fraud was not discovered, because Thomas Barton regularly paid over to the widow the amount of the dividends on the stocks. When the facts became known, the widow commenced proceedings to have the stocks replaced, and ultimately this was ordered to be done. The transferees were made parties to the proceedings, but, without getting any decision against them, the Railway Company simply blotted their names out of the register, and called upon them to repay the dividends they had received. So matters stand, except that some of the transferees have been compensated through the Stock Exchange, and in pursuance of the rules of that body. But in all cases, some presumably innocent person has been left to bear the loss occasioned by Thomas Barton's frauds. In some cases the Company by its action has escaped loss, but not in all, because where the original transferees resold their stock, the Company could not blot out the names of the purchasers, and I venture to think that in no case was the Company justified in taking the law into its own hands. The register, as I contend, can only be properly altered at the request of the

registered proprietor, or by order of a Court of Competent Jurisdiction. But of course it is of no use contending with such a mighty body as the London & North Western Company, and so those who have been unfortunate enough to be treated in this high-handed manner, have had to content themselves as best they may, or enter into a lawsuit, which, of course, would not end short of the House of Lords.

What, then, is to be done? Mr. Pitt-Lewis's Act of last Session is one answer to this question. But the Act is merely an enabling one, and no Company, not even the London & North Western Co., has shown a disposition to adopt it. Another plan would be to adopt the suggestion already made, and postpone payment for stock until it is registered in the name of the purchaser, at the request of the seller. That, however, has been stigmatised as a disorganization of business. So, apparently, investors are to be left in this Mahomet's coffin-like position, until either it suits the Companies to adopt Mr. Pitt-Lewis's Act, or the Legislature passes a compulsory Act, which in the face of the opposition of the Companies is not likely to be done. The one remedy left seems to be that which, as has been said, is called a disorganization of business. But is it really so? If Companies will not accept, voluntarily, the responsibility which seems to me to be implied in the fact of registration, and Parliament will not enact that responsibility, then even at the risk of disorganization, business-men must in the interests of the investing public, (mere speculators I leave out of account,) so carry out all purchases and mortgages, as to secure the unchallengeability of the certificates of title or proprietorship, which are to result from them. To do otherwise, would be to surrender, altogether the certainty, which is, if not the only, at least the most important, thing to be gained by having Registration of Title, whether of land or of stocks and shares.

JOHN R. ADAMS.

[I must be allowed to remark, as to *Gibbs v. Messer*, '91, A. C. 248, that a different view is at least possible. See L. Q. R., vii. 299.—Ed.]

## THE FINAL ACT OF THE FRENCH COPPER RING DRAMA.

THE failure of the Société des Métaux in March, 1889, owing to the collapse of the tremendous copper ring organised by M. Secrétan, the Gérant of the Société, and the terrible crash of the Comptoir d'Escompte, which had so imprudently guaranteed the vast engagements of that ill-fated company—a disaster only comparable in magnitude to the crisis of November, 1890, in London—are doubtless still within the recollection of most people. These failures gave rise to a mass of litigation between the different mining companies which had contracted with the Société des Métaux for the delivery of their copper to the Société—the Rio Tinto Company amongst others, a short account of whose action was given two years ago by the present writer in the pages of this REVIEW<sup>1</sup>. Eventually, however, all these companies were finally routed by a judgment of the Paris Court of Appeal of Dec. 18, 1890, which declared the various contracts made by the Société des Métaux with these companies null and void as constituting a conspiracy in restraint of trade<sup>2</sup>. An enterprising debenture holder of the Société des Métaux named Llevellyn, who held in that company the modest stake of 1500 francs (£60), and two shareholders who each held one action but whose wholly unnecessary intervention was eventually dismissed with costs, together with the two liquidators of the Société, thereupon brought an action before the Paris Tribunal of Commerce to obtain leave to strike out from the list of the liabilities of the Société des Métaux the claim of the Comptoir d'Escompte for 75,000,000 francs which it had paid for the Société to the Bank of France on the ground that since the judgment of Dec. 18, 1890 of the Court of Appeal it was

<sup>1</sup> L. Q. R. vi. 204.

<sup>2</sup> Art. 419 of the Penal Code under which M. Secrétan was prosecuted is as follows :—

‘Tous ceux qui par des faits faux ou calomnieux semés à dessein dans le public, par des sur-offres faites au prix que demandaient les vendeurs eux-mêmes, par réunion ou coalition entre les principaux détenteurs d’une même marchandise ou denrée tendent à ne la pas vendre ou à ne la vendre qu’à un certain prix, ou qui par des voies ou moyens frauduleux quelconques auront opéré la hausse ou la baisse du prix des denrées ou marchandises ou des papiers et effets publics au-dessus ou au-dessous des prix qu’aurait déterminés la concurrence naturelle et libre du commerce, seront punis d’un emprisonnement d’un mois au moins, d’un an au plus et d’une amende de cinq cents francs à dix mille francs. Les coupables pourront de plus être mis par l’arrêt ou le jugement sous la surveillance de la haute police pendant deux ans au moins et cinq ans au plus.’

clear that such a claim could not be supported. This demand was refused by the Tribunal of Commerce, and it came before the Paris Court of Appeal on Dec. 2, 1891.

It is of this action, which may be considered as the closing scene of the legal drama arising out of the financial crisis of the spring of 1889, that I now propose to give a short account. The origin of the claim of the Comptoir d'Escompte to rank in the bankruptcy of the Société des Métaux as a creditor for 75,000,000 francs was as follows. On March 5, 1889, as may be remembered, M. Denfert Rochereau, the manager of the Comptoir d'Escompte, committed suicide. It was thereupon discovered that the failure of the Société des Métaux had affected the Comptoir to such an extent that that institution was tottering and must inevitably come down with a crash so tremendous as to render it impossible even to pay the smallest depositors unless very large financial assistance could be immediately procured. The Minister of Finance appealed to the Bank of France, which after a careful consideration of the position resolved to render aid. It was considered that the deposits at sight of the Comptoir d'Escompte would not exceed a hundred million francs. That sum was immediately placed at its disposal, on the guarantee, however, of the principal credit institutions of Paris to the extent of one-fifth, viz. twenty million francs. Some days later it was found that a hundred millions would be insufficient, and forty millions more were advanced on a guarantee of the moiety of that sum by the same financial institution and on the delivery to the Bank of the entire assets of the Comptoir, composed on the one hand of various kinds of securities and on the other of the large stock of copper which had been warranted to the Comptoir by the Société as security for advances by the former. The Bank of France however is precluded by its bye-laws from making advances except upon the security of three signatures, and in order to comply with the letter of this regulation resort was had to the following proceeding. Monsieur Secrétan drew upon the Société des Métaux one hundred bills of exchange for a million francs each to the order of the Comptoir d'Escompte. These bills, when accepted by the Société and endorsed by the Comptoir, bore the necessary three signatures and could be discounted by the Bank without any infringement of its rules. By way of defining the position of affairs an agreement was drawn up and executed by the parties—the Bank, the Société, and the Comptoir—the 26th July, 1889, by which it was declared that as the claim of the Comptoir against the Société would manifestly be ultimately reduced to the extent of the value of the copper which it held as security, and as this



security had now passed to the Bank it was expedient to fix by agreement its approximate value as it could not be realised at that time without enormous loss, and it was thereby agreed that such security should be estimated at sixty-five millions. The Bank guarded itself by a series of clauses into the details of which it is unnecessary to enter against any loss by reason of the security, when realised, amounting to less than sixty-five millions, and it was settled that the Bank should rank provisionally in the bankruptcy of the Société as a creditor for 75,000,000 francs, being the difference between the 140,000,000 francs it had advanced and the 65,000,000 at which its security was valued. Eventually, the realisation of assets being terminated, the liquidators of the Comptoir d'Escompte paid to the Bank the entire sum of 140,000,000 which it had advanced and received in return the copper which had passed to the Bank as security. It therefore claimed to step into the shoes of the Bank to the extent of the 75,000,000 francs and rank as a creditor against the Société for that amount.

This claim was never disputed by the liquidators of the Société des Métaux until the judgment of the Court of Appeal, before alluded to, of Dec. 18, 1890, seemed to offer them a loophole of escape. For it appears to have at once occurred to the Société or its advisers that it might now turn against its quondam ally the weapon which together they had wielded with such signal success against the various mining companies who had brought actions against them for the fulfilment of their contracts or for damages, and thus completely escape from its onerous liability to the Comptoir d'Escompte. 'If<sup>1</sup>, they argued with considerable plausibility, 'the contracts made between the Société des Métaux and the different mining companies for the delivery of all their copper over periods of various length, extending in the case of the Rio Tinto Company to three years, were null and void as constituting a conspiracy in restraint of trade, then it follows that the sums advanced by the Comptoir to the Société for the performance of these contracts by payment of the copper were advanced upon an illegal consideration, and consequently the Comptoir was not entitled to recover them in an action against the Société. The Comptoir d'Escompte, on the other hand, relied on art. 1251<sup>2</sup>, sec. 3, of the Civil Code. On paying the Bank of

<sup>1</sup> 'Les mêmes motifs d'ordre public,' say the pleadings, 'qui ont fait déclarer non-recevable l'action des tiers contre la Société des Métaux et le Comptoir d'Escompte doivent faire également prononcer l'irrecevabilité de l'action du Comptoir contre la Société des Métaux pour une prétendue créance procédant en réalité des dites opérations entachées d'une nullité radicale et absolue.'

<sup>2</sup> Article 1251 of the Civil Code runs:—

'La subrogation a lieu de plein droit . . .

'3°. Au profit de celui qui étant tenu avec d'autres ou pour d'autres au paiement de la dette, avait intérêt de l'acquitter.'

France its claim against the Société des Métaux, the Comptoir, it was argued, became 'subrogé'<sup>1</sup> in all the rights of the Bank, and whatever defences might have been set up by the Société in an action against it by the Comptoir<sup>2</sup>, such defences were not available against the Bank and consequently not against anyone standing from a legal point of view in the shoes of the Bank. This defence found favour in the eyes of the Tribunal of Commerce, which accordingly gave judgment for the Comptoir. The Société des Métaux appealed.

On appeal this theory of 'subrogation' was accepted neither by the Avocat Général—the impartial organ of the Ministère Public, who performs in effect towards the Bench much the same<sup>3</sup> function as does an English judge when he sums up to the jury—nor by the Court. The origin of these bills was carefully scrutinised, and it was found—inevitably, as it would seem—that they were not bills given to the Comptoir d'Escompte by the Société des Métaux in recognition and in payment of a debt, for at the time that they were drawn the amount of the claim of the Comptoir against the Société was totally unknown and has to this day never been finally established, but simply and solely in order to create an 'effet de commerce' with three signatures, and thus enable the Bank of France to make an advance upon them. 'Consequently,' says the judgment, 'the Comptoir d'Escompte was never, either in fact or in law, in a position to consider itself or to be considered, as regards the Société des Métaux as a creditor who had been paid with these bills and who therefore, after having personally reimbursed a third party to whom he had transmitted them, could claim to be "subrogé" in the rights of such third party, and to shelter itself behind the conclusive effect of the *Res judicata* resulting from the judicial permission to rank in the bankruptcy of the drawer or indorser.'

The Bank of France and its legal situation having thus definitely disappeared from the contest, the Comptoir d'Escompte and the Société des Métaux remained the only combatants, and the defence which the former had successfully set up in first instance having broken down on appeal, it seemed difficult for it to escape from what the Avocat Général called the 'implacable logic' of its ad-

<sup>1</sup> The Scotch legal expression 'surrogated,' which simply means substituted, would be the exact equivalent of the French term.

<sup>2</sup> Such an action as the one described in this article could not, it is apprehended, arise in this country. The Société des Métaux having accepted the bills would have been estopped by its acceptance from denying its liability to the Comptoir d'Escompte, which was a holder in due course.

<sup>3</sup> Except that an English jury, whose sole mission it is to find the facts, must take the law of the case from the judge, whereas a French Court is by no means bound to take the same view of the law as the Ministère Public any more than it is bound to take his view of the facts.

versary's argument as to illegal consideration. In the event, however, somewhat to the general astonishment, it has succeeded in emerging triumphantly out of what looked like a very ugly predicament.

The Avocat Général, M. Falcimaigne, in his very able and lucid argument being evidently unable to see his way out of the legal impasse in which the Comptoir had become involved, and being no less evidently anxious to discover an issue, endeavoured to distinguish between, on the one hand, the sums of money furnished by the Comptoir to enable the Société des Métaux to buy up in the market, principally in London, the stock of copper actually in existence and immediately available, and, on the other, the sums which it had advanced subsequently by way of guarantee of the contracts made by the Société for the delivery of the entire future outputs of the various mines contracted with, extending over a specified space of time.

As regards the former, the Comptoir was, he contended, plainly entitled to recover inasmuch as such a transaction was in no wise contrary to law, and the judgment of the Court of Appeal did not contain a single word which implied a doubt of its legality. As regards the latter, however, the Comptoir d'Escompte could not be considered to have confined itself to its legitimate rôle of banker of the Société (as was contended throughout by its own counsel), but, inasmuch as it had actually become a party as guarantor to no less than seventeen out of the entire number of thirty-seven of these contracts, it must be considered as having participated<sup>1</sup> in an illegal conspiracy, and thereby disentitled itself to any redress at the hands of its joint tort-feasor. Finally the Court, in its judgment, went a step further. The Conseil d'Administration of the Comptoir as a body, says the Arrêt, has never been shown to have been entirely cognisant of Secrétan's illicit operations, at any rate in their ensemble. The Comptoir was only a party to seventeen out of the thirty-seven contracts, and there is nothing to prove that if there had only been seventeen of such contracts in all, the

<sup>1</sup> The representatives of the Société des Métaux did not scruple to affirm in their arguments that the Comptoir d'Escompte had been throughout the 'accomplice' of Monsieur Secrétan in his illegal speculations, basing this accusation on art. 59 of the Penal Code, which treats as an accomplice a person who has procured the means for the commission of a crime or misdemeanour, knowing that these means were to be used for such purpose. The means for the commission of the misdemeanour, said the plaintiffs, were the moneys furnished by the Comptoir, who knew the destination to which they were to be applied. The argument is specious enough in appearance, but apart from the questionable propriety of introducing into civil actions principles of criminal law, according to the judgment of the Court this was just what the Board of Directors of the Comptoir d'Escompte as a body did not know, fully or completely, whatever individual members of the Board might have known, and it was of course only as a body that the Board could bind its shareholders.

Court of Appeal would have held that they were sufficient to constitute a conspiracy in restraint of trade, as it perforce decided when it became apparent that the thirty-seven contracts together insured to Secrétan 180,000 tons of copper a year, whereas the output of the entire world does not exceed from 200,000 to 220,000 tons. Finally, says the judgment, the advances made by the Comptoir during the entire period of the illicit operations were effected under the same conditions as those previously made by reason of the credit opened several years before as banker of the Société, and no sum was actually paid by the Comptoir to the representatives of the mines in its capacity of joint and several guarantor, and as paying its own debt, but solely in its capacity of banker<sup>1</sup>, and as an advance made to its client whose account was regularly debited accordingly; the proof of this fact being that the Comptoir proceeded in exactly the same manner towards those of the mines' companies, the contracts with which it had guaranteed, and those towards which it had entered into no sort of engagement.

Judgment was accordingly given for the Comptoir d'Escompte with costs, and as far as the equity of the matter is concerned no impartial person is likely to quarrel with the decision, but it is hardly possible to withstand the conviction that legal principles were a trifle strained to afford an equitable conclusion. Some hard things were said by the Avocat Général about the morality of the behaviour of the Société des Métaux in thus turning round upon its guarantor and endeavouring by a legal quibble to shuffle out of its liabilities. Irrelevant as such observations appear to be, their justice is indisputable, and it is perhaps no great reproach to the Court of Appeal under the circumstances to suggest that it was to some extent actuated in its judgment by a desire to falsify the cynical dictum of Cicero—'Summum jus summa injuria.'

MALCOLM McILWRAITH.

<sup>1</sup> Herein the Court appears to differ from the Ministère Public.

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## CROSS-EXAMINATION: A SOCRATIC FRAGMENT.

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*Socrates.* SHALL we not be right in saying then that the object of cross-examining witnesses is to elicit the truth?

*Philotimus.* It would seem to be so, Socrates.

*Soc.* Then the good advocate, aiming at this mark, will ask only such questions as will help to discover the truth?

*Phil.* Only such questions, Socrates.

*Soc.* How shall we reconcile this with what we arrived at before, that it is the function of the judge to find out the truth, and not the function of the advocate?

*Phil.* This is a hard nut to crack, Socrates.

*Soc.* Have we not then been confusing two different kinds of excellence, that of the judge and that of the advocate, just as if we were to confuse the excellence of the terrier and the excellence of the rat?

*Phil.* We seem to have been guilty of some such mistake, Socrates.

*Soc.* Let us consider then what is the special excellence of the advocate. Will it not be to recommend himself to his client so that he may obtain more briefs, and become popular among litigious people?

*Phil.* This seems very probable, Socrates.

*Soc.* Then will not the advocate who proposes this end to himself try, if he has a bad case, to make the worse appear the better reason, and to hoodwink the jury, and to browbeat and bully the witnesses and do other things of this kind, if he sees that they please his employer and procure him special retainers?

*Phil.* This is likely enough, Socrates.

*Soc.* And if he sees a witness timid and nervous he will speak to him in a loud voice and try to frighten him, and will treat him roughly as if he was speaking lies?

*Phil.* We shall not be far wrong, Socrates, in expecting this.

*Soc.* And if he knows anything to the disadvantage of the witness he will rake it up, will he not, however old it may be, and whether it has anything to do with the matter in question or not: as if a witness is called to prove a will he will ask him

whether he did not once steal apples when he was a boy, and if he knows nothing, he will suggest things which are not true and make innuendoes and insinuations?

*Phil.* This seems his best course, Socrates.

*Soc.* And if the judge interferes or remonstrates he will insult him as far as he dares, or make slighting remarks in an undertone, to make his employer think that he is master in the court and more knowing than the judge?

*Phil.* I should advise him to act so, if he would listen to me.

*Soc.* And thus he will get the reputation of a verdict-winner, and will be talked about in the newspapers, will he not, and will receive retainers and refreshers continually?

*Phil.* No doubt, Socrates.

*Soc.* While the unskilful advocate who asks only relevant questions and is courteous to witnesses and respectful to the judge will be neglected and his fee-book will suffer?

*Phil.* Assuredly, Socrates.

*Soc.* We seem to have arrived at this then, that law is in the nature of a cock-fight, and that the litigant who wishes to succeed must try and get an advocate who is a game bird with the best pluck and the sharpest spurs?

*Phil.* It would be madness not to do so, Socrates.

*Soc.* And to know the law and the true principles of justice will be a matter of secondary importance?

*Phil.* Altogether secondary.

*Soc.* So that we may say that the law is a matter of clever rhetoric and of bullying witnesses and cajoling juries and other such arts, may we not?

*Phil.* Apparently.

*Soc.* Then how shall we reconcile this with the saying of one of the greatest of the wise men, that 'law ought to be the leading science in every well-ordered commonwealth'?

*Phil.* We are in a fix, Socrates.

*Soc.* May we not have been wrong in saying that the special excellence of the advocate is to advertise himself and make himself popular with solicitors?

*Phil.* I am inclined to think that we must hark back, Socrates.

\* \* \* \* \*

EDWARD MANSON.

THE SUPREME COURT OF THE UNITED STATES<sup>1</sup>.

**O**N the 4th of February, 1790, at the Exchange in the City of New York, the Supreme Court of the United States was organized and held its first session.' In 1890 the New York State Bar celebrated the hundredth anniversary of that event in a manner worthy of the occasion, and the goodly volume now before us is the literary record of the festival. The only criticism we have to pass on its outward appearance is that law calf and plain cut edges are hardly good enough for a book of so much artistic as well as professional merit. The etched portraits of the Justices, Chief and Associate, from Jay downwards, by Max Rosenthal and Albert Rosenthal of Philadelphia, form a most interesting series, and the difficulty of working from photographs, as the artists have had to do for the recent and present judges, has been successfully overcome. It is curious to note the increasing prevalence of a massive and square type of head in the modern period. Or can it be that the artistic fashion of the first half of the century was to extenuate this type when it occurred, whereas the present fashion would rather exaggerate it? However, this REVIEW is not the place for art criticism.

We cannot attempt to follow the history of the Supreme Court and its judges, which takes up the main part of the work. It is pretty to see how, after the first sitting of the Court, the Grand Jury for the United States gave 'a very elegant entertainment,' followed of course by divers toasts, in one of which Rhode Island—not having yet accepted the Federal Constitution—figured as 'our Stray Sister.' And many of the accounts of leading decisions will be found good and profitable reading by British as well as American lawyers. But, not having unlimited space at our disposal, we think it better to pass on to the addresses delivered at the celebration of 1890. They give us the carefully expressed thoughts of several distinguished American lawyers and publicists on the character and functions of the Supreme Court, and students of constitutional law and politics will find them worthy of special attention. Among the speakers were Mr. Edward J. Phelps, who,

<sup>1</sup> The Supreme Court of the United States : its history, by Hampton L. Carson of the Philadelphia Bar, and its centennial celebration, February 4th, 1890. Prepared under direction of the Judiciary Centennial Committee. Philadelphia : John Y. Huber Company. London : Sampson Low, Marston & Co., Limd. 1891. Plates. 4to. xvi and 745 pp. (£4 4s.)

as the United States Minister to this country, achieved the seemingly hopeless enterprise of adequately replacing Mr. Lowell; and Mr. Justice Field, long known to all readers of the United States reports as one of the strongest and most independent members of the Court, in whose defence against an enraged suitor (an ex-judge of California) a certain Deputy Marshal, not long ago, shot quickly and shot straight, and was most properly held to be justified.

In the course of these addresses we find repeated mention of the power of American Courts to disregard Acts of Congress as being contrary to the Constitution of the United States, or Acts of State legislatures as being contrary either thereto or to the Constitution of the particular State. A recent parliamentary controversy has shown that the nature of this power is still not clearly understood by many educated Englishmen. It may therefore be useful to quote some of the passages in which it is expounded. Mr. Hitchcock of Missouri puts it neatly:—‘Neither the Federal nor any State constitution in terms grants such a power. It results from established legal principles, whenever the mandate of an inferior conflicts with that of a superior legislative authority; whether the former be a corporate by-law or municipal ordinance transgressing the charter, or a legislative enactment in disregard of constitutional limitations. In exercising it, the Court simply fulfils its judicial duty of declaring the supreme law and applying it to the case in hand.’ The same point is more fully developed by Mr. Justice Field.

‘Under the Constitution of the United States, the Supreme Court is independent of other departments in all judicial matters, and the compatibility between the Constitution and a statute, whether of Congress or of a State, is a judicial and not a political question, and therefore is to be determined by the court whenever a litigant asserts a right or claim under the disputed Act for judicial decision.

‘This power of that court is sometimes characterised by foreign writers and jurists as a unique provision of a disturbing and dangerous character, tending to defeat the popular will as expressed by the legislature. In thus characterising it they look at the power as one that may be exercised by way of supervision over the general legislation of Congress, determining the validity of an enactment in advance of its being contested. But a declaration of the unconstitutionality of an Act of Congress or of the States cannot be made in that way by the Judicial Department. The unconstitutionality of an Act cannot be pronounced except as required for the determination of contested litigation. No such authority as supposed would be tolerated in this country. It would make the Supreme Court a third house of Congress, and its conclusions would be subject to all the infirmities of general legislation.



‘ . . . . . Whenever, therefore, any court, called upon to construe an enactment of Congress or of a State, the validity of which is assailed, finds its provisions inconsistent with the Constitution, it must give effect to the latter, because it is the fundamental law of the whole people, and, as such, superior to any law of Congress or any law of a State.

‘ . . . . . This unique power, as it is termed, is therefore not only not a disturbing or dangerous force, but is a necessary consequence of our form of government. Its exercise is necessary to keep the administration of the Government, both of the United States and of the States, in all their branches, within the limits assigned to them by the Constitution of the United States; and thus secure justice to the people against the unrestrained legislative will of either—the reign of law against the sway of arbitrary power.’

Mr. Phelps’s address, which, like all his work of this kind, is admirable in style, dwells on the function of the Supreme Court in defending individual rights, which assuredly is among its most important ones. ‘It was reserved for the American Constitution to extend the judicial protection of personal rights, not only against the rulers of the people, but against the representatives of the people.’ In the Supreme Court citizens of the United States have ‘the bulwark of the people against their own unadvised action, their own uninstructed will.’ These words of American and republican statesmanship take us very far from the clamour of English politicians who talk as if a majority for the time being of the House of Commons had a divine right to override all the rules of both legal and political justice.

The great constitutional saying, delivered by Chief Justice Chase in the judgment of the Supreme Court in *Texas v. White*, 7 Wall. 700: ‘The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States,’ is more than once prominently quoted, as might be expected. We give the words because we have an impression that the phrase is sometimes misquoted ‘an *indissoluble* Union,’ &c. The adjective ‘indissoluble’ does occur in the context, but not in this sentence.

We trust that public and professional libraries in England will not omit to secure this book. Its importance, and probably its pecuniary value, will increase with every year that passes.

FREDERICK POLLOCK.

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## REVIEWS AND NOTICES.

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[Short notices do not necessarily exclude fuller review hereafter.]

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1. *Statutory Rules and Orders*. 1890. Published by Authority. 1087 pp.
2. *Index to the Statutory Rules and Orders*. 1891. Published by Authority. 355 pp.

ENGLAND is the mother of parliaments, and her first-born, the English Parliament, is the most prolific of legislatures. In its time Parliament has produced some 20,000 public general acts, but, not content with its own fecundity, it has created a large number of subordinate bodies with delegated powers of legislation. These bodies in their turn have given birth to an innumerable progeny of rules and orders having statutory or quasi statutory force. Though an Englishman is bound by law to know and respect these grandchildren of the legislature, he has hitherto had but little chance of making practical acquaintance with them. They have been hidden away in all sorts of holes and corners. Some of the multifarious rules and orders have been published in official documents such as the London Gazette or a Parliamentary Paper or a Stationery Office publication, while others could only be found either in papers printed for the department primarily concerned with them, or in the text-books of industrious writers on special subjects.

The Statute Law Committee have already rendered great services to the profession and the public by their authoritative Index to the Statutes, and by undertaking a revised edition of the Statutes which will separate the living law from the dead. The Committee have now conferred a further boon on their bewildered countrymen by publishing the two volumes at present under review.

The first volume consists in a reprint of all the statutory Rules and Orders published in 1890, which are in the nature of public general acts, as opposed to local and personal acts. At the end of the volume is a classified list of the more important Rules and Orders of a local or personal nature. The editor, Mr. A. Pulling, junior, who seems to have done his work most thoroughly and carefully, has prefaced the text of the Rules and Orders with two tables. The first table gives their dates in chronological order, and the second table arranges them according to the department or body which issued them. A full index to the subject-matters dealt with concludes the volume.

The second volume, which is the work of the same learned gentleman, will be invaluable to the profession. It is a general index to all Statutory Rules and Orders in force on the 1st of January, 1891, which are in the nature of public general acts, and it is a monument of patient and laborious research. Hitherto, as the Statute Law Committee remark, there has been no systematic record of such Orders, nor any available means by which the public can discover whether the authority to make them has or

has not been exercised, or if exercised at what date and to what extent, nor where the Orders may be found. The index is intended to supply these wants, and its plan is detailed in the following extracts from the preface:—

‘The index is strictly limited to Orders which are authorised by a specific statute, and does not extend to those (such as most of the Regulations for the Army) which are made independently of any statutory power . . .

‘In many cases an Order continues in force although the Act conferring the authority to make it has been repealed. In these cases the reference to the Act conferring the authority is given notwithstanding its repeal.

‘The headings in the index follow, as a rule, the headings in the index to the Statutes (published by the Committee). There have been added under the names of the different government departments which make Orders, references to the headings under which the Orders made by them are referred to. The entries in the index state the statutory authority for making the Order, with the name of the department by which or with whose concurrence it is made. This is followed by an enumeration of the existing Orders issued under such authority, the mode of publication being added in italics. Some description of the more important Orders is also given. The reference is in all cases given to official documents, except in those cases where the Order is found only in certain text-books. When the Orders have been published in the Law Reports or in Hertslet’s Treaties or State Papers, a reference is given to those publications.’

To give an illustration of the working of the index. Suppose the Rules regulating the practice on English Informations to be the object of research. The heading ‘English Information’ gives a cross-reference to the main heading ‘Crown Suits.’ Under the latter heading it will be found that power to make rules for regulating the procedure on English Informations was given to the Lord Chief Baron and two or more Barons of the Court of Exchequer by the 28 & 29 Vict. c. 104, s. 28; that Rules were made under this power on the 14th March, 1866, which were published by the Stationery Office, and which may also be found in L. R. 1 Ex. pp. 389–420, and 35 L. J. N. S. 1; that the above-mentioned section is now repealed by 44 & 45 Vict. c. 59, s. 6, and that the rule-making power is now vested in the Committee empowered to make rules for the Supreme Court. The main headings of the rules of 1866 are also given:

The Statute Law Committee further intimate that ‘it is intended henceforward to publish all Orders which are of a public and general character in a form uniform with the official octavo edition of the Statutes, at the end of each year.’ Inasmuch as the volume for 1890 consists of 1087 pages, it is plain that a considerable addition to law literature is about to be made. But could not the Committee do somewhat more for us? Their efforts to improve the Statute Law by means of carefully drafted Consolidation Bills have lately been impeded by the fussy timidity of the House of Commons. But they could proceed to consolidate Statutory Rules and Orders and issue a revised edition of them without the intervention of the legislature. For this work, no doubt, the co-operation of the various rule-making departments and bodies would be required. But public departments are seldom lacking in public spirit, and for their own sake as well as that of the public, they would probably lend a willing hand to the work.

The substance of English law may be excellent, but its shapeless mass and obscurity are a standing disgrace to us. A Frenchman, for three or four francs, can buy an excellent edition of the laws of his country, and carry it about comfortably in his pocket. But imagine an unfortunate English citizen going out for a walk with the Indexes to the Statutes and

Statutory Orders, and the seven bulky volumes of Fisher's Digest stowed away about his person. Yet he would only be furnished with an incomplete index to the laws of England, and not with the laws themselves. As the result of this state of things, an educated French layman generally knows far more of French law than even a learned English lawyer knows of English law. An Englishman may well say, by how much law and with how little wisdom are we governed.

M. D. C.

*The Law of Land Ownership in Scotland.* A treatise on the Rights and Burdens incident to the Ownership of Lands and other Heritages in Scotland. By JOHN RANKINE. Third Edition. Edinburgh: Bell & Bradfute; London: Sweet & Maxwell, Lim. 1891. La. 8vo. liv and 1099 pp. (45s.)

THAT this work, originally published in 1879, has already reached a third edition, is an indication of the acceptance with which it has been received, and shows that it has accomplished its aim and has 'filled up an admitted gap in Scotch legal literature.'

The peculiarity of Mr. Rankine's work is that it treats the law of land ownership altogether apart from questions of conveyancing. The case dealt with is that of an owner in possession of lands and the questions considered are as to the extent of his rights, the limitations to which they are subject in favour of the public and of individuals, and the public burdens which he has to bear in respect of his ownership. The work is divided into four parts, (1) Possession and Ownership generally, (2) Restrictions in favour of the Crown and the public, (3) Restrictions in favour of individuals, and (4) Public Burdens.

The first part deals with the effect of possession in giving a right to remedies by interdict and otherwise against intrusion; its effect under the laws of prescription in securing a right of ownership from challenge; the meaning and extent of ownership, including the treatment of such questions as those relating to boundaries, accession, trespass, minerals, &c. The second part deals with such subjects as the right of the Crown or the public in seas and navigable rivers, ports and harbours, salmon fishing and highways. Under the third part are dealt with the limitations due to neighbourhood, including the law of nuisance and of servitude, and the limitations which are due to the coexistence of a title to the same subject in the person of another, including the law of common property, commonalty, common interest, fee and liferent, and entails. The fourth part deals with the parochial, County and Imperial burdens which are laid upon the owners and occupiers of lands and heritages in Scotland.

The omission of all questions of conveyancing, while sufficiently justified by convenience alone, has a peculiar justification in view of the duplicate origin of the Scots law relating to land. That law shows the influence of two very distinct sets of ideas, those of the feudal and those of the civil law. But the feudal law, which, till a comparatively recent date, added much to the notion of property, e.g. privileges and duties of a military, legislative and judicial character, has now become a system of tenure alone, and is not of importance except in questions of conveyancing. The ideas of property and ownership in the law of Scotland now rest upon the civilian conception of these words as understood and developed by Scots lawyers almost as completely as if Scotland had never been a feudal country.

Mr. Rankine, therefore, in cutting off all questions of conveyancing has

practically freed his book from the technicalities of the feudal law, and has dealt with a branch of the law which is not so peculiarly local but that it may possibly be read not without interest in England.

The learning and research which have gone to the composition of the work are apparent; the language has that brevity and precision which is essential in a legal text-book.

R. T. Y.

*A Treatise on the Law of Contracts.* By C. G. ADDISON. Ninth Edition, by HORACE SMITH, assisted by A. P. PERCIVAL KEEP. London: Stevens & Sons, Lim. 1892. La. 8vo. cxxiv and 1367 pp. (£2 10s.)

EIGHT years have elapsed since the last edition of this standard work, and many changes in the law have occurred which called for emendations of the text. The Married Women's Property Act, 1882, and the Bills of Exchange Act, 1882, are now incorporated in the body of the work, and the many important decisions upon the former are referred to by way of illustration with great care and minuteness. The Bankruptcy Act of 1883 has also involved considerable changes in the text, while the provisions of the Stamp Act, 1891, so far as they relate to the Law of Contract, are given in an Appendix on Stamps.

Notwithstanding the addition of much new matter, the bulk of the present edition has been curtailed by 100 pages. This has been accomplished both by careful condensation and by pruning away what was obsolete or superfluous. The grouping of subjects has been rearranged; e.g. 'the Parties to a Contract' now forms the subject of a separate chapter. Some obsolete terms, such as 'transportation,' have disappeared from the present edition, and the editor has preferred omitting altogether the subject of 'marriage settlements' to dealing with it inadequately (see p. 1202).

The cases of the *Mogul Steamship Co. v. Macgregor* and *Derry v. Peek* deserve more attention than a mere footnote reference. The case of *Cochrane v. Moore*, 25 Q. B. D. 57, might have been referred to on p. 3, note (e), but the practical exclusion from the work of the subject of 'gift' accounts for the omission of this case and of the important case of *Allcard v. Skinner*, 36 Ch. D. 145. The introductory chapter might have shown more traces of the progress made by the growing science of jurisprudence, from which recent works on the Law of Contract have gained both clearer definitions and a more scientific analysis of the legal terms involved in the conception of Contract. Pothier's definition of a Contract, containing no reference either to any legal consequences resulting from an agreement or to any form or consideration, is scarcely a satisfactory definition with which to commence at the present day a work on the English Law of Contracts. However, as a practical treatise, and as a storehouse of authorities on the Law of Contracts in general and on the law of particular contracts, the work before us will not easily be displaced from the prominent and almost unique position it has held for nearly half a century.

S. H. L.

*The Principles of Pleading in Civil Actions under the Judicature Acts.* By W. BLAKE ODGERS. London: Stevens & Sons, Lim. 1892. 8vo. xxxii and 260 pp. (8s. 6d.)

THIS excellent little book, which we briefly noticed in our last number, will be invaluable to those who having acquired some theoretical knowledge

of law as a science are entering upon its practical study as an art. Most pupil-rooms have hitherto been absolutely destitute of any guide through the dark and devious ways of practice. The rule of thumb has usually prevailed, supplemented occasionally by some traditional MS. notes and copies of precedents. Dr. Odgers' book therefore supplies a distinct want.

Practitioners moreover in escaping from the narrowness and technicality of the old system of pleading have been in danger of falling into a loose and slipshod slovenliness under the new system. Dr. Odgers helps his readers to combine the logical accuracy of thought of the earlier system with the greater freedom and elasticity of method and style introduced under the Judicature Acts.

The work before us deals with the practical rules which must be observed to ensure 'materiality' and 'certainty' in pleading; it goes on to discuss 'answering' or 'attacking your opponent's pleading'; it then gives with good illustrative examples a number of specific rules for framing each successive pleading in an action, and after a chapter on 'interrogatories,' and another on 'advice on evidence,' concludes with a summary of the rules of Court relating to pleading and an useful index.

The work moreover is prefaced with tables of (1) Cases, (2) Statutes, and (3) Rules and Orders cited.

The author justly criticises (p. 120) the illogical forms of Statement of Claim in Appendix C to the R.S.C. in which the order of time and order of thought are sacrificed to an unwise attempt at conciseness. Among other controversial matters he discusses (pp. 26-28) the 'convenient though illogical' practice of pleading in aggravation or mitigation of damages with the conflicting decisions thereon.

We find little in the work to criticise adversely. The full repetition of some of the illustrations (e. g. *Smith v. Feverell*, 2 Mod. 6 : see pp. 19 and 57) might perhaps have conveniently been spared while some additional forms would have enhanced the value of the book.

But the accuracy of the work leaves nothing to be desired; the style is terse, clear, and pointed, and while the subject-matter of the book is sufficiently elementary for the student just entering chambers, its range is sufficiently wide and comprehensive to render it of great assistance to the junior in fair practice.

S. H. L.

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*Les bureaux internationaux des Unions universelles.* Par GUSTAVE MOYNIER. Genève, Cherbuliez; Paris, Fischbacher. 1892. 8vo. 175 pp.

M. MOYNIER, so long and favourably known for his publications upon the Convention of Geneva, and for his services as President of the Red Cross Societies, has done well to call attention in this compendious monograph to an institution which has come into existence so quietly as to be less known than it deserves to be. The social convenience of the civilized world has been much promoted during the last quarter of a century by the signature of a series of conventions, whereby a large number of states have bound themselves to concerted courses of action with reference to postal communications, weights and measures, and similar topics of common concern. The network of Treaty engagements to this effect has been, not quite correctly, described by the late Professor von Stein as constituting a body of 'International Administrative Law.' It was soon found that the effectual working of such agreements required, in each case, a central office and staff of officials.

It is of these establishments that M. Moynier has for the first time given a connected account. They are at present nine in number, each with its permanent home, and an income derived from the *pro rata* contributions of the signatories of the convention of which it is the organ. The earliest attempt of the European Governments 'to form themselves into a syndicate' for administrative purposes resulted in the formation in 1865 of the 'International Telegraphic Union,' which in 1868 was provided with a central bureau at Berne. Bureaux were established in the same city for Posts in 1874, for Industrial property in 1883, for Literary and Artistic property in 1886, and for Railway Goods traffic in 1890. A Bureau for Weights and Measures was established in 1874, at Paris; for Geodesy in 1886, at Berlin; for the Suppression of the Slave Trade in 1890, at Zanzibar and at Brussels; for the publication of Customs Tariffs in 1890, at Brussels. Great Britain is concerned with all the bureaux, except those dealing with Geodesy and with Railway Traffic. In a concluding chapter M. Moynier has some interesting remarks on the probable future of these first essays in systematic international co-operation.

T. E. H.

*New Commentaries on Marriage, Divorce, and Separation as to the Law, Evidence, Pleading, Practice, Forms, and the Evidence of Marriage in all Issues, on a new system of legal exposition.* By JOEL PRENTISS BISHOP. Two vols. Chicago: T. H. Flood & Co. 1891. La. 8vo. Vol. I, xlix and 759 pp; Vol. II, x and 831 pp.

THIS book incorporates the earlier works of the author on parts of the same subject. It proceeds 'on a new system of legal exposition,' which consists, as stated in the preface, 'of carrying each question into the light of, first, the entire subject; secondly, the entire legal system; thirdly, those laws of our earthly existence which man has no power to change; and lastly, those technical rules which have become established through the judicial doctrine of *stare decisis*; then, of introducing into the problem all the considerations which are relevant, and *especially not overlooking any*, and thereby determining and writing down what, in fact, the judicial mind of our own country and age, when duly made cognizant of all, will hold upon the several questions. It follows no opinion of any preceding writer or judge which an examination shows to be contrary to the reasonings and settled doctrines of the law, and especially it never introduces any opinion or reasoning of the author, but states instead the law's reasonings and conclusions as every judge will hold them on being duly enlightened from the bar.'

This system is expounded at some length in the introduction, but in spite of its claims to novelty it does not appear to differ materially from the methods employed by most legal writers of repute.

The title (subject to this remark) fairly represents the contents; both American and English law are discussed. The author sometimes uses language which in this country would not be considered English, such as 'the excelsior legal mind.' But only a small minority of his readers will care about that.

Mr. Bishop has expended much labour and research. See, for instance, in vol. i. the sections (100 et seq.) on 'The Origin and Nature of the English Ecclesiastical law,' chapter xvi. on the element of a formal solemnization, which includes the discussion of *Reg. v. Millis*, 10 Cl. & Fin. 534, chapter xiii on 'Void and Voidable in Marriage,' and the lengthy discussion in the second volume as to jurisdiction in divorce as affected by domicile.

While the English lawyer will hesitate to adopt all the author's conclusions, which are necessarily founded in part on American decisions, he will find the book useful, as it appears to contain most of the cases. The only modern English case of importance that we are unable to find is *Brinkley v. Attorney-General*, 15 P. D. 76 (the Japanese marriage case), which ought to have been cited as being the converse of *Re Bethell*, 38 Ch. D. 220.

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*The Law of Husband and Wife.* By CHARLES CRAWLEY. London: Wm. Clowes & Sons, Lim. 1892. 8vo. lxiii and 486 pp. (20s.)

MR. CRAWLEY is in one respect unique among the compilers of law-books. Instead of giving the time-honoured preface which is so dear to the hearts of his race, he has composed a Latin dedication to Mr. Justice Henn Collins, which is a pretty, if not an apposite, ἀπαξ λεγόμενον in a law library. But is it not a stretch of imagination to describe a judge of the Queen's Bench Division as *viduae et orbis aegis*? Be this as it may, Mr. Crawley is to be congratulated upon having composed a careful and accurate treatise upon a difficult subject. The Law of Husband and Wife is a branch which becomes more knotty and gnarled with every fresh effort of the Legislature to simplify it. Witness the myriad cases which have encumbered the Act of 1882 during the nine years of its career. Mr. Crawley has adopted six exhaustive divisions of his subject, those being (i) status and personal rights, (ii) rights in relation to property, (iii) civil obligations, (iv) dealings *inter se*, (v) procedure, civil and criminal, and (vi) the effect of matrimonial decrees. But the most readable and interesting part of his book is the introductory chapter, which contains a historical sketch of the English law of marriage and its effects on persons and property, with a comparative view of the marriage laws of the other principal countries of Europe. This begins with an apt quotation from Brehm, to the effect that genuine marriage is only to be found among the birds. Turning to small things Mr. Crawley might well give the dates of the cases which he cites, he might quote the recent decision of the Court of Appeal in *Cleaver v. Mutual Reserve Fund Life Association* ('92, 1 Q. B. 147) upon sect. 11 of the Married Women's Property Act 1882, and he might refrain from calling the reporter of 'State Trials' 'Howard' instead of 'Howell.'

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*Commentaries on the Law of Private Corporations.* By CHARLES FISKE BEACH, jr. Two vols. Chicago, Ill.: T. H. Flood & Co. 1891. La. 8vo. clxxxvii, xvi and 1487 pp.

THESE volumes are 'an attempt to include in one treatise all the law of private corporations, whether with or without capital stock, of joint stock companies, and of all the various so-called *quasi*-corporations and voluntary unincorporated associations which exist for any private purpose.'

The author tells us in his preface that since 1885 he has also 'in connection with an active practice' written works on Contributory Negligence, Receivers, and the Modern Law of Railroads, and has besides two other treatises,—'Municipal Corporations,' and 'Modern Equity Jurisprudence'—now well advanced.

The result is what might be expected from an attempt to cover so much ground in so short a time. The treatise on Corporations, like the one on Railways, though good in design, is hasty and imperfect in execution, and valuable only as a very complete digest of the decided cases.



The list of cases cited comprises seventy-six double column pages, and embraces a very large number of decisions by the United States Circuit Court and other Courts, whose decisions are not final, and many of which are of little value in themselves. The author has, however, avoided the error of Mr. Morawetz in his brilliant work on Corporations. He has written to show the law as it is stated in the decided cases, and not to advance and support a theory, and has done this with such fulness as to make the work of great practical value.

The particulars relating to subscriptions to stock, and the liability of shareholders for corporate debts, and to 'combinations, pools, and trusts,' are specially full and useful, while those which treat of 'voting trusts' and other devices for depriving shareholders of the control of the corporation contain a very full and valuable statement of all the recent decisions upon this subject.

It is to be hoped that when Mr. Beach has completed the treatises he has now in hand, he may by a careful revision make this the most accurate, as it is undoubtedly the most complete, American work on Corporations.

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*The Justice's Note-Book: containing the jurisdiction and duties of Justices and an epitome of Criminal Law.* By the late W. KNOX WIGRAM. Sixth Edition, by ARCHIBALD HENRY BODKIN. London: Stevens & Sons, Lim. 1892. 8vo. xii and 646 pp. (12s. 6d.)

THE task of revising the present edition of the Justice's Note-Book, which has already won for itself an established position among works of a similar class, has been assigned to Mr. Bodkin. The style has been brought more into harmony with the requirements of a practical treatise on magisterial law by the toning down of some of the exuberances of the late Mr. Shirley's fancy; while at the same time the vein of humour which still runs through the book prevents its becoming dull reading.

The arrangement of the present edition has not undergone any substantial alteration, though recent legislation and a somewhat fuller index have combined to swell the size of the volume in spite of the omission of a large number of skeleton forms in use by Justices. The Statutes of 1887, extracts from which were to be found without annotation in the Appendix only, have now been incorporated with the text, while recent legislation and decisions have been brought down to the present time, and include the Public Health London Act, 1891, though no mention is made of the Factory and Workshop Act of the same year. It may also be remarked that by section 18 of the last-mentioned Act (which was the result of the Berlin Labour Conference of 1890, and to some extent embodies the resolutions there arrived at) the limit of age as regards the employment of children in factories and workshops has been raised from ten to eleven years after the 1st of January, 1893. The work otherwise offers little scope for criticism, but its value to the Bench and to the profession generally would be much enhanced if it contained an index to the cases referred to in the text, which, while increasing the utility of the work as a handy book of reference, would not occupy many pages.

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*Contempt of Court, Committal, and Attachment and Arrest upon Civil Process, in the Supreme Court of Judicature. With the Practice and Forms.* By JAMES FRANCIS OSWALD. London: William Clowes & Sons, Lim. 1892. 8vo. xxiv and 214 pp. (12s. 6d.)

THE claim which Mr. Oswald makes in his preface to 'familiarity' with

the subject of 'Contempt of Court' will be readily admitted by the profession. The author carefully expounds the law on (1) Contempts direct, (2) Contempts indirect or consequential, and (3) Particular or special contempts. He discusses imprisonment for offences within the various exceptions to the Debtors' Act, 1869, and explains the procedure for attachment or committal or for obtaining discharge from custody, giving precedents of necessary forms in an Appendix.

We find no reference in the chapter on 'indirect contempts' to the question which was recently much discussed in connection with the *De Souza* case as to whether a Court can imprison for contempt a man who adversely criticises a matter which has been finally disposed of. The Attorney-General in the House of Commons, in vindicating the judges of British Guiana for committing a man under these circumstances, stated that there were many such precedents; but the Judicial Committee of the Privy Council in giving special leave to appeal said that they were aware of none.

Mr. Oswald urges the necessity of a definition by the Legislature of so vague an offence as Contempt of Court and of a limitation of the punishment which may be imposed, and we are inclined to share his regret that Lord Selborne's Bill of 1883 was allowed to drop.

The work before us is written in a pleasant, easy style, and will be a far more convenient reference book than the ponderous works on practice in which the subject has hitherto been embedded.

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*A Handy Book for Shipowners and Masters.* By H. HOLMAN. Third Edition. London: Stevens & Sons, Lim. La. 8vo. viii and 208 pp. (5s.)

THIS book, written by a lawyer, is not intended for lawyers but for shipowners and shipmasters. The general idea of the book is good; for if business men can be induced to read a work calling attention to decisions such as that in *The Palinurus*, the writer confers a benefit upon the shipping community. We mention this judgment, in itself not a very important one, because within a short time of its delivery it did in fact cause the proper screening of a steamship's stern light many thousands of miles away from England. The hints (p. 37) against laxity in filling up shipping documents are useful and practical; and the illustrations of carelessness and ambiguity, drawn from recent decisions in the Courts, are such as business men will appreciate. Mr. Holman is familiar, not only with the forms and effect of shipping documents, but with the ways of shipping business and the habits of the shipping community.

The book will perhaps satisfy owners better than masters. The difficulties of the latter class do not seem to meet with the same sympathetic appreciation which the writer evidently feels for those of shipowners. We should doubt whether shipmasters universally agree with the suggestion that undermanning is a cause of so few casualties (5 out of 7213) as Mr. Holman suggests. Again, the master's duty as to bringing his ship up or getting under way in improper weather, when he has a pilot on board, should be indicated one way or the other. If the Courts give an uncertain voice, the shipmaster is at least entitled to the benefit of Mr. Holman's opinion upon such a matter. The easy generalities of the Courts as to what is 'moderate' speed in a fog are of little or no use to the seaman. Mr. Holman does not seem to think that to the shipmaster the law and his owners are in this

matter as the devil and the deep sea ; yet we do not hear of captains of Atlantic liners being discharged for habitually navigating in a fog at a speed which is not the 'moderate' speed of the law courts.

The book is disfigured by an onslaught upon Mr. Plimsoll and an advertisement of the Shipping Federation. The former is unnecessary ; the latter out of place.

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*A Practical Treatise on the Law of Trusts.* By THOMAS LEWIN. Ninth Edition, by CECIL C. M. DALE. London : Sweet & Maxwell, Lim. 1891. La. 8vo. lxxxviii and 1402 pp.

THERE is no one in all Lincoln's Inn who does not realise the value of his familiar 'Lewin' as helpmeet. A cordial welcome therefore is due to this ninth edition, succeeding its predecessor after an interval of some seven years and showing no sign of falling off from the high standard of excellence which we are wont to expect. We must express our entire approval of Mr. Dale's careful work and our marvel at the industry which—apart from his labours as a reporter—can put a new edition of 'Lewin,' and the first volume of 'Seton' upon the editorial table within three months. In this as in preceding editions the new matter is carefully differentiated from the old, and the arrangement of subjects is maintained intact. It might be well to have a list given of the chapters and sections, although there is already a tabular analysis, and we should like to see the dates of the cases quoted. By this last matter we set great store, though we care little for the duplicated or quadrupled references to contemporaneous reports. Mr. Dale's list of 'addenda et corrigenda' is not unduly long, but if he mentioned the Maybrick insurance case at all, he should have realised that the decision of the Queen's Bench was reversed last December by the Court of Appeal. These, however, are small things and detract little from the general excellence of a monumental work.

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*The Practice of the Land Registry under the Transfer of Land Act 1862,* with such portions of the rules as are now in force ; and general instructions, notes, forms, and precedents. By CHARLES FORTESCUE BRICKDALE. London : Waterlow & Sons, Lim. 1891. 8vo. iv and 90 pp.

THIS is useful as a manual of practice, but from the nature of the book it contains but little of general interest to the profession. Attention should however be paid to the remark at p. 1, that it is not safe to deal with any interest in land under a title commencing later than 1862, without searching the public index of lands kept in the Land Registry to see whether the land is registered under the Act of 1862 or 1875 or not. We rather doubt the wisdom of the advice on p. 56, that on going to reside abroad, a registered owner of land or a charge should leave with his solicitor a general power of attorney to deal with his registered land in the fullest and amplest terms. Surely this would enable an unprincipled solicitor to dispose of his client's land.

The book appears to be written very clearly, and will no doubt be of great use to those who have to deal with land under the Act of 1862. We are glad to see that the author purposes to publish a treatise on the Land Transfer Act, 1875, and possibly on the Middlesex Registry Acts.

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We have also received :—

*The Record Interpreter: A Collection of Abbreviations, Latin Words and Names used in English Historical Manuscripts and Records.* Compiled by CHARLES TRICE MARTIN. London: Reeves & Turner. 1892. 8vo. x and 341 pp.—This is an unpretentious but thoroughly useful little book. The first part of it consists of a list of those words which medieval scribes were wont to write compendiously, the second of a glossary of low Latin words, the third of a list of the Latin names borne by places in Great Britain and Ireland. A small book of this kind is just what the decipherer of English legal records very often wants. He could not be always carrying about with him the fourth volume of Hardy's 'Registrum Dunelmense,' and from time to time he would be in need of some brief hand list, over which he could glance in order that he might know what to look for in the pages of Ducange. Mr. Martin's book should serve his turn. We have noted some omissions; for example, does not the capital *R.* very often stand for *responsio*? Still no book of this size—and its small size is one of its great merits—will solve every riddle devised by those pen-men who were economical of their parchment.

*The Revised Reports*, being a republication of such cases in the English Courts of Common Law and Equity, from the year 1785, as are still of practical utility. Edited by SIR FREDERICK POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. III. 1794–1796. (2 Vesey Jr.—3 Vesey (to p. 299)—6 T. R.—2 H. Bl.—1–2 Anstruther—1 Peake—Leach Cr. Ca.—6 Bro. P. C.) London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co., 1892. La. 8vo. xvi and 754 pp. (25s.)—The learned reader may conveniently be notified that '6 Bro. P. C.' is represented by one case, preserved in a separate form, alone among the verbiage of Brown's eight volumes, because it was an appeal from Scotland. English cases reported by Brown (so far as still of practical utility) have been incorporated with the report in the court below.

*The Law of Real Property; chiefly in relation to Conveyancing.* By H. W. CHALLIS. Second Edition. London: Reeves & Turner. 1892. La. 8vo. xxxii and 466 pp. (20s.)—This book has approved itself as what Mr. Challis meant it to be, 'a trustworthy guide to the fundamental principles of Real Property law.' More than one other book professes to be an easier introduction to the subject. But the reader who has learnt from Mr. Challis will have learnt, not merely how to get through the common run of business without making bad mistakes, but what to do with real difficulties when they occur. He will have nothing to unlearn, and few things will take him by surprise. Mr. Challis's dedication to Mr. W. B. Trevelyan will give pleasure to those who know how well the praise of Mr. Trevelyan's learning is deserved. Readers of this REVIEW will recognise in the appendix some articles contributed by Mr. Challis at different times, and will again regret their almost gnomic brevity.

*Law and Practice of Divorce and other Matrimonial Causes.* By W. JOHN DIXON. Second Edition. London: Reeves & Turner. 1891. 8vo. xciv and 721 pp.—The title of this book very fairly describes its contents. It is divided into two heads, 'Law' and 'Practice.' Under the first head will be found full descriptions *inter alia* of the requisites to a valid marriage and of jurisdiction on matrimonial causes as affected by domicile. The table of cases presents a little novelty: there is attached to each case a very few

words stating the nature of the points raised in it. The index appears to be full. We think that this book will be found useful to practitioners in matrimonial causes.

*Hints as to advising on Title and practical suggestions for perusing and analysing abstracts, with an outline of the Law relating to title to land and Tables of Stamp Duties since 1815.* By W. H. GOVER. Second Edition. London: Sweet & Maxwell, Lim. 1892. 8vo. xxxii and 181 pp.—This second edition has been called for little more than two years after the publication of the first. A book so received by the most critical branch of the profession needs little further commendation.

*A Study of Influenza, and the Laws of England concerning Infectious Diseases.* A paper read before the Society of Medical Officers of Health, January 18, 1892. By RICHARD SISLEY, M.D. London: Longmans, Green & Co. 1892. La. 8vo. 119 pp. (3s. 6d.)—The general upshot of this tract is that the legislature and persons in sanitary and other authority were as much surprised by the influenza as everybody else. Dr. Sisley points out some curious and apparently useless differences between the general Public Health Act and the recent special Act for London. Let us hope that his warnings will not have been forgotten whenever influenza returns. As he says, people do not yet understand how much more important—and practicable—prevention is than cure. ‘We still live in the Drug Age.’

*The Solicitor's Clerk*, a handy book upon the ordinary practical work of a Solicitor's Office, &c. By CHARLES JONES. Second and revised edition. London: Effingham Wilson & Co. 1892. 12mo. 252 pp. (2s. 6d.)—This appears to be a sensible and practical manual. The advice to young clerks in the important and too much neglected matter of handwriting is especially good. Bankers' clerks, we may add, always write, as Mr. Jones advises, from the arm, not from the wrist. A chapter is given to shorthand, rightly enough. We suspect, however, that Mr. Jones will have to add a chapter on type-writing to the third edition.

*The Law and Practice of the Court of Record for the Hundred of Salford, in the County of Lancaster.* By J. HARVEY SIMPSON. Manchester: Meredith, Ray & Littler. 1892. 8vo. viii and 196 pp.—Her Majesty's Court for the Hundred or Wapentake of Salford has been described by Parliament as a Court of ancient jurisdiction, but for more than twenty years it has been a thing of statutory rules and forms. Apparently there has been no book on its practice since 1859, so Mr. Simpson has done a much needed piece of work for local practitioners.

*An Exposition of English Law by English Judges, compiled for the use of layman and lawyer from the most recent decisions (1886–1891).* By J. A. NEALE. London: W. Clowes & Sons, Lim. 1892. La. 8vo. xxxiii and 224 pp. (12s. 6d.)—This is neither more nor less than a commonplace book limited to extracts from English decisions of the last five years. If any lay reader gets hold of it and imagines that detached sentences from this and that judgment are ‘not an imperfect commentary upon the law, but the law itself,’ some odd consequences may be expected. On at least one important and unsettled point (whether a corporation can be liable for malicious prosecution) Mr. Neale reproduces a strong extra-judicial dictum without any warning that it is not decisive. At the beginning of O two

headings of 'Oaths Act' and 'Obiter Dicta' have been mixed up in a grotesque fashion. On the whole, we cannot say this is a book of practical utility.

*A Treatise on the Specific Performance of Contracts.* By the Right Hon. SIR EDWARD FRY, one of the Lords Justices of Appeal. Third edition. By the AUTHOR and E. P. FRY. London: Stevens & Sons, Lim. 1892. La. 8vo. xci and 836 pp. (36s.)—Some interesting historical matter is added to this edition. The learned author dissents from the decision of his brethren in *Bolton v. Lambert*, 41 Ch. Div. 295. Further notice will follow in the July number.

*The Law of Musical and Dramatic Copyright.* By E. CUTLER, Q.C., T. EUSTACE SMITH, and F. E. WEATHERLY. Revised Edition. London: Cassell & Co., Lim. 1892. 12mo. iv and 172 pp. (3s. 6d.)—This little book has already been favourably noticed in these pages (L. Q. R. vii. 88). In the present edition the recent case of *Moul v. Groenings* ('91, 2 Q. B. 443) is discussed, and the American Copyright Act is given in an Appendix. *Fishburn v. Hollingshead* (discussed by T. E. S. in our January number) is also cited, and we learn that the parties accepted the decision as final.

*A Selection of Leading Cases in the Criminal Law* (founded on Shirley's *Leading Cases*). With Notes. By HENRY WARBURTON. London: Stevens & Sons, Lim. 1892. 8vo. xxiv and 272 pp. (9s.)—As in some other modern selections, the leading cases are not reported, only abridged. It would be proper in any future edition to insert in the title the word 'abridged,' or other words conveying the like intimation. Whatever its possible uses may be, such a book is essentially different from a book that reproduces the selected cases at large.

*The Platform: its rise and progress.* By HENRY JEPHSON. 8vo. 2 vols. xx and 586, xiv and 625 pp. London: Macmillan & Co. 1892. (30s. net.)—This is a full history of extra-parliamentary political speaking in England, and the increase of its practical influence in politics. It is not within the province of this REVIEW to say more of it than that the incidental statements about the law of public meetings and speeches appear to have been carefully framed, and to be correct so far as they go.

*Wharton's Law-Lexicon:* forming an epitome of the Law of England, &c. Ninth Edition. By J. M. LELY. London: Stevens & Sons, Lim. 1892. La. 8vo. 793 pp. (38s.)—We regret that no attempt has been made to revise the antiquarian articles. The next best course would have been to omit them altogether.

*The Parliamentary Election Manual: a practical Handbook on the Law and Conduct of Parliamentary Elections in Great Britain and Ireland, &c.* By T. C. H. HEDDERWICK. London: Stevens & Sons, Lim. 1892. 12mo. xxix and 324 pp.—Mr. Hedderwick's manual seems to be clear and well arranged, and its publication is cunningly timed.

*Partnership and Companies: A Manual of Practical Law.* By PERCY F. WHEELER. London: A. & C. Black. 1892. 8vo. xiv and 300 pp. (5s.)—Business men who are not lawyers may possibly find this book useful. It appears to be clear and readable. The references to authorities are so scanty as to show that it is not intended for professional use.

*The Annual Digest of all the Reported Decisions of the Superior Courts,*  
VOL. VIII. N

*including a selection from the Irish . . . during the year 1891.* By JOHN MEWS. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1892. La. 8vo. xxxv and 411 pp. (15s.)

*The Complete Annual Digest of every reported case in all the Courts, for the year 1891.* Edited by ALFRED EMDEN. Compiled by H. THOMPSON and W. A. BRIGG. London: W. Clowes & Sons, Lim. 1892. La. 8vo. lviii pp. and 442 columns. (15s.)

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# THE LAW QUARTERLY REVIEW.

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No. XXXI. July, 1892.

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## NOTES.

IN the May number of the *Contemporary Review* Mr. Strachey has stated his firm belief, with all the emphasis of conviction which can be imparted by italics, that a member of the House of Commons who succeeds to a peerage of the United Kingdom may retain his seat if he refrains from demanding his writ of summons to the House of Lords.

The question is one of practical interest, but the only authorities which Mr. Strachey can produce for his startling announcement are (1) the practice of the House of Commons to await the issue of the writ of summons to the House of Lords before declaring a seat to be vacant by the accession of one of its members to the peerage; (2) the fact that peers by refraining to ask for their writs have been able to retain places in the Civil Service which are incompatible with a seat in either House of Parliament.

Neither authority can do much for Mr. Strachey's contention. The evidence which the House of Commons requires to establish a disqualification is not the same thing as the disqualification itself. Insanity is a disqualification; but the proof of insanity, sufficient to vacate the seat, before the Act of 1886, was a very difficult matter. As to the peers who occupy places in the permanent Civil Service, it should be borne in mind that the disqualification for the Civil Service is constituted not by the peerage but by actual membership of either House, and the consequent participation in active political life.

Without emulating the confidence of Mr. Strachey one may suggest some points for consideration which do not seem to have occurred to him.

The Peerage is a *status* conferring rights and imposing liabilities which are not those of the Commoner. (First Report on the Dignity of the Peerage, p. 14.) Among these the peer is entitled to

be tried by his peers for treason or felony ; he is also an hereditary counsellor of the Crown, whether or no he is a Lord of Parliament. It may be suggested that the disqualification for membership of the House of Commons consists in belonging to the estate of the Baronage, and not wholly or merely in sitting in the House of Lords : for it is only by virtue of the Act of Union that an Irish peer, who receives no summons to Parliament, can sit for a British constituency. On this view the House of Commons would after a time declare a seat vacant on such evidence as would show that the sitting member, though not summoned to the House of Lords, had ceased to belong to the estate of the Commons.

Again, the issue of the writ of summons does not rest entirely with the peer who is entitled to it. The Queen might summon her hereditary counsellor to take his place in Parliament. The Lords, jealous as to the constitution of their House, might address the Crown as they did in Lord Bristol's case to issue the writ of summons (Gardiner, *Hist. of England*, vi. 94). The question raised amounts to this, Can a peer surrender his peerage? The answer in the *Purbeck* case, 1678 (Collins, *Baronage*, 293), is a negative.

W. R. A.

A settlement executed on her marriage by an infant, unless under the authority of the Court, may be repudiated by the infant. But when the infant claims her own property free from the settlement, she must, if she takes under the settlement an interest in any other property, e.g. in property settled by her husband, make compensation out of such interest to the persons who are disappointed by her election to repudiate. Supposing such interest is settled to her separate use without power of anticipation, does the restraint on anticipation prevent her from giving it up for the purpose of such compensation? Sir W. P. Wood thought not; *Willoughby v. Middleton*, 2 J. & H. 344. Sir G. Jessel, however, thought that this doctrine of Sir W. P. Wood would enable her to destroy the most careful provision of her own relatives for her protection: *Smith v. Lucas*, 18 Ch. D. 531. Chitty J. decided *Re Wheatley*, 27 Ch. D. 606 in accordance with Sir G. Jessel's view, and *Re Vardon's Trusts*, 31 Ch. D. 275, was a similar decision of the Court of Appeal; where it was said in effect that the doctrine of compensation rests on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it; that the presumption of such general intention might be repelled by a declaration in the instrument itself of a particular intention inconsistent with the presumed general intention; and that the affixing of a restraint on anticipation was the manifesta-

tion of a particular intention to make the interest inalienable, and incapable of being given up for the purpose of such compensation. In *Hamilton v. Hamilton*, '92, 1 Ch. 396, a settlement was made on the marriage of a female infant, who thereby covenanted to settle her after-acquired property. By the same settlement she took interests for her separate use without power of anticipation in other property settled partly by her husband and partly by her own father. Her husband obtained a decree nisi for a divorce in December 1889. On the 6th of June 1890 she commenced an action claiming to be entitled to repudiate the covenant to settle her after-acquired property; and in this she was ultimately successful, and the only question was how far she was bound to make compensation. The divorce was made absolute on the 10th of June 1890; and the restraint on anticipation was of course inoperative during her discovery. If nothing else had happened she would of course have been bound to make compensation out of the interests which the settlement gave her in the property settled by her late husband and by her father. But on the 14th Oct. 1890, before the trial of the action, she married again. North J. held that the restraint on anticipation revived, and relieved her from the necessity of making compensation out of the interests to which it was annexed.

This decision does not altogether square with one's ideas of natural justice. If the wife, immediately before her second marriage, had executed, as it was absolutely within her power to do, a deed removing the restraint on anticipation so far as might be necessary to give effect to any compensation she might be required to make, compensation might have been ordered. By her own act of marrying again without executing such a deed, she enabled herself to repudiate the covenant without making the compensation required by equity. If the mere fact of bringing the action did not amount to an election (and North J. held on good authority that it did not), still it might have been held to involve an offer by her to make the necessary compensation in the event of her subsequently electing against the settlement. And such an offer, if she was discovered at the time, might well have been held to amount to a disposition *pro tanto* of her interests, taking precedence of the subsequently reviving restraint on anticipation. No doubt the decree nisi was not made absolute till four days after the commencement of the action, but the action might very well be held to involve a continuing offer of the kind above suggested.

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'The cases put in argument of the company putting a known lunatic, or a known biting dog, or a known leper, or a man known

to be drunk and quarrelsome, into a carriage with one of the ordinary travelling public, have no bearing upon the present case, for the consequences likely to arise therefrom would be well known to the company when they contracted to carry the passenger. The consequences likely to arise from putting pitmen to travel with a passenger, at the time of the contract believed to be one of the ordinary travelling public, would not be that the pitmen should break the law and assault their fellow-passenger.'

These words from the judgment of A. L. Smith J. in *Pounder v. The North E. Railway Co.*, '92, 1 Q. B. 385, sum up the grounds on which the Queen's Bench Division have held that a railway passenger has no legal ground of complaint for being compelled to travel in the same compartment with six or seven ruffians whom he fears will, and who do in fact, brutally assault him. In the particular instance the decision of the Queen's Bench Division may have been right, but the principle embodied in his lordship's judgment is rather a startling one. Can it be maintained that a railway company and its servants owe no protection to a passenger from any peril the possible existence of which could not reasonably be anticipated at the moment when the passenger's ticket was taken? *A* takes a ticket from London to Rugby. On getting into the train he finds himself in a compartment alone with *B*, a man twice his size, by whom he has already been assaulted and placed in peril of his life, and who threatens to repeat the assault. *A* asks for a place in another carriage. The railway servants decline to give it. *A* is compelled to travel sixty miles alone with *B*, and is assaulted and nearly killed. Is it easily maintainable that there is no ground of action on *A*'s part against either the railway company or its servants?

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*Royal Aquarium &c. Society v. Parkinson*, '92, 1 Q. B. (C. A.) 431. This case deserves the careful attention of all county councillors. It establishes two principles of great practical importance.

1. A councillor when engaged in debate on business before the council is not exercising judicial functions in such a sense as to be able to claim absolute immunity from actions for defamation in respect of whatever he says.

2. The words of a councillor when engaged in debate are no doubt uttered on a privileged occasion; he may therefore, when acting *bond fide*, be often protected from civil or criminal liability for statements which are defamatory and untrue, but his claim to privilege depends on his speaking *bond fide* 'in the sense that he is using the privileged occasion for the proper purpose, and is not abusing it . . . . If a person from anger or some other

wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, . . . a jury is justified in finding that he has abused the occasion.'

This is sound sense, and we believe good law. Lord Esher has done the world a service in reminding cranks or fanatics that honest enthusiasm is no excuse for reckless slander. The privileges of M.P.'s and judges are at least as wide as is required by the public interest. They should certainly not be extended to county councillors.

*Cross v. Fisher*, '92, 1 Q. B. (C. A.) 467, gives effect to the rigorous provision of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 43, under which the directors of a building society are made personally liable for the amount of loans or deposits received in excess of the limits prescribed by the Act. Whether such exceptional legislation be expedient or not is a question open to argument, but it is certainly expedient that the court should give full effect to Acts of Parliament. The real, though unperceived difficulty in the way of codifying the law is the tendency of our judges to interpret statutory enactments with a narrowness which they do not display when called upon to interpret the principles of Common Law or of Equity. *Cross v. Fisher* is a cheering example of a court being resolute enough to follow the principle, and not merely the words, of an Act of Parliament.

It is a popular delusion that the difficulty of deciding questions before a law court arises from the over-subtlety of lawyers and the absurd technicalities of pleaders. 'Let us,' says the plain man of common sense, 'have no pleadings, and then we shall have no quibbles.' What he overlooks is, that in ninety-nine cases out of a hundred the difficulties which harass judges arise, not from the technicality of law, but from the inherent difficulty of adjusting legal principles so as to solve questions raised by the complexity of facts. Nicety of distinctions lies in the nature of things. These are the kind of reflections suggested by the curious case, *Consolidated Co. v. Curtis*, '92, 1 Q. B. 495. The apparent owner of goods has, under a bill of sale, parted with the right to sell them. He hands the goods over to Curtis and Son, auctioneers, for sale. The auctioneers sell the goods. Are they guilty of an interference with the rights of the true owner, who in effect owns the goods under the bill of sale? Mr. Justice Collins holds that they are. It is quite possible that another judge might have held that the auctioneers, who knew nothing of the bill of sale, did not commit any wrong. The difficulty, however, of answering satisfactorily



the enquiry raised in the case depends at bottom, not on subtleties of pleading, but upon the difficulty of reconciling the undoubted rights of ownership, with a due regard to the rights of persons who, with completely innocent intentions, do unwittingly interfere with the rights of ownership.

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*In re Shine*, '92, 1 Q. B. (C. A.) 522, decides two points of some little interest.

First, a payment of £30 a week, due to an actor under an agreement made for two years, is either a salary or an income, and therefore comes within the Bankruptcy Act, 1883, s. 53, sub-s. 2. We confess to some little surprise that the question as to such a payment being either salary or income should have been held open to argument. It is certain that income tax would be payable upon it.

Secondly, such salary or income being gained by personal services does not *prima facie* vest in the trustee in bankruptcy under Bankruptcy Act, 1883, s. 54. The bankrupt therefore may part with the whole or part of it, and after he has so parted with it, the Court cannot order it under the Bankruptcy Act, 1883, s. 53, sub-s. 2, to be paid to the trustee.

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*Attorney-General v. Gosling*, '92, 1 Q. B. 545, defeats an attempt to evade payment of account duty under 44 & 45 Vict. c. 12, s. 38. It is satisfactory to find that modern judges are becoming more and more ready to give a natural and fair interpretation even to taxing Acts. The public interest has, from time to time, suffered a good deal from the now obsolete theory that these Acts ought to be in some sense construed against the Crown, or in plain words, against the interest of the nation. The case is also curious as containing an authoritative correction of the language used in a former judgment in *Attorney-General v. Chapman*, '91, 2 Q. B. 526; we must now read 'probate' duty instead of 'legacy' duty. A speculative question arises, how far a Court has power in one case to correct the language of a judgment delivered in a different case.

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*The Royal College of Veterinary Surgeons v. Robinson*, '92, 1 Q. B. 557, reads a good lesson to persons who attempt to gain custom from an ignorant public by claiming qualifications which they do not possess. X, a mere shoeing smith, who does not possess qualifications required by 'a practitioner of veterinary surgery,' has for the last twenty-five years described his forge as a 'veterinary forge.' He has thereby incurred a fine under the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 17, sub-s. 1, for using a description which implies that he is qualified to practise as a

veterinary surgeon. That this form of imposture should be put down is satisfactory, but *X* may think it rather hard that his little pretence should bring down legal punishment in a world where politicians, professors, teachers, and others, so constantly get employment by claiming qualifications which they do not possess, yet go unpunished and unblamed.

Will it be ever possible to put an end to the question whether a given document is a memorandum within the 4th or 17th section of the Statute of Frauds? We doubt it. The enquiry in each case is one which depends upon minute facts hardly reducible under a general principle. *Evans v. Hoare*, '92, 1 Q. B. 593, raises the point under a new form. *X* offers *A* employment as his clerk, and sends *A* a form of acceptance in the shape of a letter from *A* to *X*, whose name is inserted at the head of the letter. *A* signs the letter, *X* is held bound by it as by a memorandum. The decision is reasonable, but is it reasonable that the question of *X*'s liability should depend on the accident whether *X* had or had not put his name at the head of the letter? If any rising M.P. wishes to attain fame or notoriety, his most easy way of doing it is to bring forward a bill in these words: 'The Act 29 Car. II. c. 3, ss. 4 & 17 shall be and are hereby repealed.' It will be easy for an ingenious man to find arguments in favour of such a bill; it is perhaps possible, but it is not easy, to find satisfactory answers to them.

*The Imperial Loan Co. v. Stone*, '91, 1 Q. B. (C. A.) 599, supplies distinct authority for a doctrine which has long been discussed by professors and teachers in law, but has not been thoroughly considered by the Court. It is this: that madness, drunkenness, and the like on the part of a promisor, do not relieve him from liability for a contract he makes, unless his incapacity be known to the promisee. The Court of Appeal have now determined that if *X* who makes a contract sets up the defence that he was insane when he made it, he must also, in order to succeed, show that at the time of the contract his insanity was known to the promisee. This decision exactly falls in with the doctrine of Professor Holland, that the validity of a contract depends not on the consent of wills, but the apparent consent of wills on the part of the contracting parties. (See Holland, Jurisprudence (5th ed.), p. 222.)

*Heathorn v. Fraser*, '92, 2 Ch. (C. A.) 27 will help to clear the air as to acceptance by post. The legal puzzle was on this wise. *A* after some epistolary negotiation leaves with *B* an offer of the refusal of certain property, *B* posts an acceptance at 3 p.m. the next day. Two hours earlier *A* has written revoking his offer (having agreed to sell

to C), but this letter does not reach B till 5 p.m. Problem to find the purchaser. *Household Fire Insurance Co. v. Grant* (4 Ex. Div. 233) decided that in such a case the contract was complete on the posting of the acceptance, but the theory on which Baggallay and Thesiger L.JJ. proceeded was that the offerer had authorised the Post Office to receive the reply. Lord Herschell and Lindley L.J., however disclaim this view, and state the true principle thus: 'Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.' But what if the acceptance is never received, on Baggallay and Thesiger L.JJ.'s hypothesis this does not matter for there is a constructive delivery. Are we on the new theory to treat an offer which may be responded to by post as containing an implied agreement by the offerer to take the risk of non-delivery and dispense in that event with communication? Some such particular agreement to dispense with communication there must be as is well pointed out in the keen criticism of Bramwell L.J.'s dissenting judgment in *Household Fire Insurance Co. v. Grant*.

[If an offerer prescribes a mode of acceptance, he takes the risk that the mode which he has prescribed may fail to convey the answer to his mind. If he does not prescribe a mode of acceptance, the offerer may communicate his acceptance in such a manner as corresponds with 'the ordinary usages of mankind.' If this communication does not reach the offerer, who is to suffer? *Semble* the offerer. And when is the contract made? When the communication is made. *Henthorn v. Fraser* does but apply the rules in *Byrne v. van Tienhoven* and the *Household Fire Insurance Co. v. Grant* to the case of a written offer delivered by hand and accepted by post.—W. R. A.]

It is old law that a surety paying the debt is entitled to all the securities which the creditor holds for it. It is quite another proposition to say that the creditor is entitled to all the securities held by the surety; yet such was the contention in *Sheffield Banking Co. v. Clayton* ('92, 1 Ch. 621). *Mawer v. Harrison* (1 Eq. C. Abr. 93) was cited, but when brought to light the supposed authority, mummy-like, crumbled into dust. Such counter-securities go only to swell the surety's assets, though in doing so they indirectly benefit the creditor. That is all. Apart from the point of law what is gratifying and a matter of legitimate pride to English lawyers is to see the patience, the research, the thoroughness with which a point like this is threshed out by our judges, the original records sent for and searched and no pains spared.

*Archer's case* ('92, 1 Ch., C.A., 322) is, as the author of *Erewhon* would express it, a 'straightener' for the morals of directors. Bribery is Protean in its forms. In *Archer's case* it took the shape of an agreement by a promoter to buy back at par a person's qualification shares if he would become a director. This kind of indemnity is of course a thing of value. In *Archer's case* it proved worth exactly £500, and for this the director was on the plainest principles of agency, accountable to the company, but this sum is by no means the measure of the wrong done to the company by such a clandestine agreement. The object of a qualification clause in articles is to secure a director having a substantial stake in the company and so guaranteeing his *bond fides*. Such an agreement as *Archer's* entirely nullifies the benefit of such a provision. It enables a director to pose as having an ostensible without any real stake in the welfare of the company and to betray its interests with unconcern. A really more difficult question of law was raised by the *Marquis of Bute's case* ('92, 2 Ch. 100), viz: how far a President of a Savings Bank who does not attend the meetings of the directors is liable for the neglect of the rules. Stirling J. took a lenient view. A director is not bound to attend every board meeting (*Perry's case*, 34 L. T. R. 716), but as Lord Hardwicke observed (*Charitable Corporation v. Sutton*, 2 Atk. 405), 'If some persons are guilty of gross non-attendance and leave the management entirely to others they may be guilty by this means of the breaches of trust that are committed by others.' It is this culpable laches which facilitates so many frauds by trustees as well as directors.

Since *Re Almada and Tirito* (38 Ch. Div. 415) the worlds of law and commerce have been aware that a limited company cannot issue its shares at a discount, but it is satisfactory to have the matter set at rest once for all by the authority of the House of Lords (*Ooregum Gold Mining Co. of India v. Roper*, '92, A.C. 125). The principle at stake—and there could hardly be a more vital one—was whether a company's capital is to be a reality or a sham. In the *Ooregum* case everything was *bond fide*; but would this always be so? Not unless promoters' morals should undergo an entire transformation. The inviolability of a company's capital, as Giffard L.J. once said, is the price of the privilege of limited liability. For joint stock companies it is the keystone of stability and success.

A retailer of goods bearing a pirated trade mark is technically an infringer and as such liable to an action for an injunction without any previous warning. The late Master of the Rolls, we have it on the authority of Chitty J., used when at the bar to advise his

clients in such cases to give no notice but move at once, and there may be, nay, must be, therefore good reasons at times for doing so; but when, as in *American Tobacco Co. v. Guest* ('92, 1 Ch. 630), it is a trumpery case of a few packets of cigarettes worth 17s. 6d. in the hands of an innocent retailer willing to make all amends, the issue of a writ without warning is a litigious act which the Court may well discourage by giving no costs. The proper persons to sue are those who place the spurious goods on the market. 'This sort of thing,' said Bramwell B., speaking of issuing execution the moment after judgment, 'is regulated by good feeling.' The Court has now, to supplement good feeling, a most wholesome discipline of costs and may thereby express a very effective opinion on the merits of an action. *Skoppee v. Nathan & Co.* ('92, 1 Q. B. 245), where a sheriff's officer was sued for a trifling and unintentional error of his clerk, is an example of an action which has no merits at all.

The law of slander is not quite so illogical as the Court of Appeal in *Alexander v. Jenkins* ('92, 1 Q. B., C. A., 797) seem to think. The test in all such cases is, does the slander 'touch the plaintiff in his office, profession or trade'? A charge of drunkenness against a beneficed clergyman of course does; he runs the risk of deprivation. So against a schoolmaster, it loses him pupils or his post: not so against a town councillor, for drunkenness would be no ground for removing him as unfit (at all events it was none in *Alexander v. Jenkins*), and removal in the case of an office not of profit is the only damage which our unsentimental law can regard. An imputation of drunkenness would now 'touch' anybody whether in office or not, but the Common Law crystallized in a pre-temperance age, an age when excess in drinking was not only no disqualification for an office, but like swearing and other accomplishments the mark of a gentleman. 'Agh,' exclaimed a Highland attendant, 'its sare changed times at Castle Grant when gentlemen gang to bed on their ain feet.' Times may be 'sare changed' but the law still savours of the good old times. If it is to be brought into line with modern sentiment, the Legislature must intervene as it has done in the case of words imputing unchastity to a woman.

If *Ex parte Hopkins* (61 L. J. Q. B. 240) has for the moment defeated the ends of University discipline, it is consolatory to feel that it has been the means of exhibiting to great advantage the admirable wisdom and impartiality of our law. No judge, not even the Vice-Chancellor of a University, exercising a criminal

jurisdiction, can try anyone unless they first charge the person and give him or her the opportunity of pleading to the charge. This is elementary law, not to say justice, but it was not attended to in *Daisy Hopkins*' case. This young person was not charged at all, that is to say, charged with any offence known to the law. 'If,' says Falstaff, 'it be a sin to be fat and merry, God help the wicked,' and if 'walking with an undergraduate' means consignment to the Spinning House, such construction would eclipse the gaiety of the 'Eights' or 'Commem.' Euphemisms are favoured by the fastidious taste of academic life, and everybody concerned knew quite well what 'walking with an undergraduate' meant. But when it comes to bread and water for a fortnight in a University gaol, on the strength of a *double entendre* we recognise the desirability of charging an offence with something like explicitness even at the risk of being prosaic.

It is a reasonable rule that a mortgagor wanting to pay off the debt should pay six months' interest in lieu of notice: for the mortgagee ought to have time to find a new security. It applies (as why should it not) though the subject of the mortgage is a reversionary interest (*Smith v. Smith*, 40 W. R. 32), but it ought not to apply and does not apply, so Chitty J. has held (*Fitzgerald's Trustees v. Mellersh*, '92, 1 Ch. 385), to an equitable mortgage by deposit. Such mortgages are now very common for securing a temporary loan from bankers. This differentiates them from the permanent investment contemplated by a legal mortgage and displaces the ordinary implication. To make them irredeemable, except on six months' notice, would very much hamper business. A tender by a mortgagor under protest, it may be noted, is good (*Greenwood v. Sutcliffe*, '92, 1 Ch., C. A., 1), though a conditional tender is not.

*National Building Society v. Raper* ('92, 1 Ch. 54) is also of some interest on a point of foreclosure practice. When a mortgagor makes default in redeeming on the day fixed by the foreclosure judgment the mortgagee has become or is entitled to become the absolute owner, and therefore his receiving rents after that date ought not to prevent his getting an order for final foreclosure, though the affidavit of default may not have been sworn till after receipt of the rents. This is the common sense view of the matter, adopted by Chitty J. Repeatedly reopening the account would lead to a puzzle like that of Achilles and the tortoise. The mortgagee would never overtake the mortgagor.

Libel or no libel, according to the most recent cases, is a question of evidence, generally for a jury, and the Court should not prejudge

it by granting an interlocutory injunction; but it would be a very unfortunate thing if the Court could not restrain an impudent trade libel like that in *Collard v. Marshall* ('92, 1 Ch. 571). When persons are parading in front of a man's place of business with offensive placards falsely calling him a sweater and other bad names, damages at a distant date are a very inadequate remedy. The plaintiff says 'I want this thing stopped,' and an interlocutory injunction alone can do this. Promptness of redress is one merit of an injunction, another is the negative mode it affords of enforcing specific performance—witness *Ryan v. Mutual Tontine Westminster Chambers Association* ('92, 1 Ch. 427), where a 'top flat,' having stipulated for a resident male porter, objected to having the door opened for visitors by a charwoman or boy in shirt sleeves, and sought an injunction to restrain the landlord from furnishing such inadequate substitutes. It was what the late Lord Bramwell would call a 'desperate point' to demur to the jurisdiction on the ground that it would be enforcing specific performance of a contract for personal services. Making people work together is one thing: making a landlord provide a porter is another. It is no more a personal service than making him provide a coal scuttle or a door mat.

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'The Council' (of Law Reporting), said Lindley L.J. (1 L. Q. R. 147), 'should leave no effort unspared to make its Digest as perfect as possible.' This advice the Council has evidently followed, and it is to be congratulated on the latest result achieved. Some idea of the magnitude of the work is conveyed by the fact that the type employed on it weighed twenty-two tons, while the Table of Cases alone fills over 500 pages. The alphabetical arrangement by titles has been adhered to, and has been more thoroughly carried out in the sub-titles. This is right. An alphabetical arrangement pure and simple would be chaos, but combined with the arrangement by titles and sub-titles it is far the best. The titles make the arrangement scientific, and the alphabetical order makes it easy of reference. Another improvement is that a very considerable body of statute law has been incorporated. When, as in these days, statute law enters so largely into every branch of our law, this combination of case and statute law very much enhances the value of a digest: nor is it any sacrilege thus to distribute the sections of an Act. If the scheme of the Act or the context of a scheme is material, the Act itself can always be turned to.

Yet we still desire to see a greater conciseness in the statement of cases. They are classified head-notes of the Reports rather than propositions of law. This is a matter which has more than once been

the subject of comment in this REVIEW. What the profession wants, as Lindley L.J. has said, is law, the 'legal pith' of a case and the legal pith only. Anything more than this incumbers the book and fatigues the inquirer. It is not worth while in a digest to set out a case with any fullness, because no conscientious lawyer can rely on a case in a digest. He must go to the report itself. Smelting the ore is doubtless very hard work, but it is of the essence of a good digest.

The titles and sub-titles are mostly well-chosen, and the arrangement of matter under each judicious, but there are still some anomalies. Thus 'Employer's Liability' should come under Master and Servant, 'Restraint of Trade' under Contract, 'Oath' under Evidence. 'Mischievous Animal' is not a good title. If we have 'Sale of Goods' as a title it would be better to put Sale of Land with it under a general title 'Sale' than under a separate title 'Vendor and Purchaser.' Why, again, should not the decisions in the Weekly Notes, not afterwards appearing in the Reports, be incorporated? They are frequently of value on points of practice.

On the whole the new Law Reports Digest marks a great advance, and if the Council follows up its improvements we shall at no distant day get what is destined to be the most useful law book of the future, an ideal digest.

And yet the vagaries of the 'Law Reports' in the choice of cases seem uncontrollable. If ever there was an unreportable case in any Court it is that of *Hall v. Hall*, in which the Court of Appeal have unanimously affirmed the decision of Lord Justice Fry, sitting as a judge of first instance. The case is reported in the 'Law Reports,' '91, 3 Ch. 389, and '92, 1 Ch. 361, occupying in all thirteen pages. It was a case upon the proper construction of a very peculiar will, very inartificially drawn by a commercial traveller. Lord Justice Kay said in terms that the construction would, in his opinion, lay down no canon to guide in the construction of another will, unless another will should be made in identical language. This is a thing which is hardly within the range of possibility. In the face of this remark the case is fully reported in each stage, thus adding a substantial weight to the burden under which subscribers to the 'Law Reports' groan. The initials responsible for the case are H. C. J., and in the Court of Appeal M. W. Where is the editorial power? Why should subscribers be laden with three volumes of Chancery decisions every year when cases of this type might be ignored? The strongest reporters who ever worked on the Law Reports are responsible for the thinnest volumes in the Exchequer and Exchequer Division.



One has a difficulty in perceiving what is gained by reporting the case of *Claridge v. South Staffordshire Tramway Co.*, '92, 1 Q. B. 422 (the May number). Can there possibly be any doubt of the difference between the proposition that a bailee may maintain an action for injury to the chattel by negligence, equally with the bailor, and the proposition that he can recover the same amount of damages that the bailor is entitled to? Perhaps the report, and even the appeal itself, may be due to a confused recollection of the point discussed in *Johnson v. Lancashire & Yorkshire Railway Co.*, 3 C. P. D. 499.

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We should be leaving a pleasant duty unperformed did we not draw the attention of English lawyers to a series of admirable articles in the *Harvard Law Review* written by Mr. J. B. Thayer. He is tracing the history of trial by jury and the history of the law of evidence, and is bringing to light many things that have escaped the eye of earlier explorers. He shares with his colleague, Mr. J. B. Ames, a mastery of the Year Books which must be very rare even on the American side of the Atlantic. The *Harvard Law Review* is rapidly making itself an absolutely indispensable member of the library of every one who has any care for the history of the common law.

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Among recent additions to the materials for English legal history we must notice 'Three Early Assize Rolls for the County of Northumberland,' edited by Mr. William Page and issued by the Surtees Society. The Surtees is constantly proving itself to be the most enlightened of all our local antiquarian societies. On this occasion it has published among its subscribers three judicial rolls of the thirteenth century which are full of interesting and valuable cases, and which should be read by many who are not Northumbrians. In his preface Mr. Page pleads that he is a beginner. He has made an excellent beginning.

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*It seems convenient to repeat in a conspicuous place that it is not desirable to send MSS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.*

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## CRIMINAL PROCEDURE IN FRANCE.

**R**ECENT events have brought prominently before the notice of the British public the manner in which people are arrested and the charges against them investigated in France, and I purpose in this paper to give a short sketch of criminal procedure in that country.

To go minutely into the very complicated provisions of the law on this subject and describe the varied attributes and powers of the numerous functionaries who compose what is called in France 'la police judiciaire' would be probably both too long and too technical to interest even professional readers. I shall therefore merely attempt here to give an outline of the main features of a criminal investigation in France. Let us suppose that a man is accused of a crime in that country either by a verbal accusation to a passing policeman, as in the case of the two Englishmen which not long ago created so considerable a sensation, or by a formal and written communication to the Procureur de la République, or Public Prosecutor. The judicial machine has now been set in motion; let us see how the matter is conducted, following the affair through its various stages until it reaches the Cour d'Assises. A charge made in the public street to a policeman on duty being a matter of everyday occurrence to which any one may be subjected without warning, it will perhaps be more convenient to start from this point. The accused person is taken into custody, let us suppose, on the Place de l'Opéra or the Boulevard des Italiens. The first step is to take him to the nearest Commissariat de Police. If the Commissaire is at the police station at the time he will be interviewed at once, but the duties of that important functionary being extremely manifold he is not unlikely to be out, in which case the accused person will of course be detained till his return. Having been rapidly examined by the Commissary, the evidence of the accuser and of the policeman having been taken down in writing, the accused person will probably be told that the charges against him are very grave and that the 'dossier' (the case) will be immediately sent to the Public Prosecutor and the Juge d'instruction. It is this latter personage in whose hands is placed in practice the sole conduct of every criminal case, and his powers are enormous. The

accused person is detained as a matter of course at the 'Poste' or lock-up till the wishes of the Juge d'instruction are ascertained. This magistrate—who is one of the Judges of the Tribunal of the locality, nominated to the functions of a Juge d'instruction for three years with the possibility of continuance at the end of that period—will issue a 'mandat de comparution,' ordering the accused person to be brought before him if such person is already in custody. Otherwise he issues a 'mandat d'amener,' which is equivalent to our magistrate's warrant. The prisoner is then brought before him, as a rule pretty promptly, in his private room at the Palace of Justice. And now begins that system of criminal procedure initiated in France but now common to most other countries in Europe, which is so utterly foreign to the English notion of criminal law and justice that an Englishman who is not acquainted with it has great difficulty in believing it to be true, while those who know it well seldom become reconciled to its extraordinary methods. The whole aim and object of the procedure is, as soon as the authorities become convinced of the prisoner's guilt—a conviction at which they frequently arrive with unwarrantable haste—to force that unhappy individual to confess his sins. Physical torture has been abolished, as most people are aware, for some time in criminal procedure, but it is doubtful whether the rack and the thumbscrew were much harder to bear than the mental torture to which prisoners are subjected in France from their first interview with the Juge d'instruction to the close of their trial at the Cour d'Assises. For unfortunately and almost inevitably with men whose functions are exclusively criminal and who are daily in the habit of employing these peculiar methods for extracting the truth, the Juge d'instruction has almost always a more or less well-defined bias against the prisoner. In the case we have supposed, he will have read the depositions of the accuser, the policeman, and the commissary of police before he sees the prisoner. Then the 'interrogatoire' begins. It is directed more usually than not and more or less to the knowledge of the Juge d'instruction himself to prove that the prisoner is guilty of the offence of which he is charged. The accusation is *prima facie* true—this, I mean, is the often unconscious idea in the mind of the Juge d'instruction—and everything alleged by the prisoner in his defence must be most carefully verified. Let it be noted, moreover, that the accused person has to grapple singlehanded with the Judge, the police, and the accuser. He is not allowed any professional advice, and everything he says or omits to say will be used against him to the utmost advantage. There is a law at present under discussion for permitting the prisoner to be assisted by counsel during his ex-

amination by the Juge d'instruction, but it has been under discussion for several years now and has not yet become law.

At the close of several hours of cross-questioning of this kind the magistrate issues a '*mandat de dépôt*' if he thinks there is a *prima facie* case against the prisoner, and the latter is incarcerated for the present. This is one of the enormous powers before alluded to of the Juge d'instruction.

By virtue of this '*mandat de dépôt*' the prisoner can be kept in custody for months, being brought up from time to time for fresh interviews with the Juge d'instruction, when the same harrying, bullying, and badgering is renewed, '*pour amener des aveux!*' There is no effective means of checking this power. The Juge d'instruction is nominally under the control of the Procureur Général and the Courts of Appeal, but neither one nor the other ever interfere with the discretion of the Judge in this matter.

The prisoner may be liberated on bail by the Judge in criminal cases, and for misdemeanours punishable with less than two years' imprisonment liberty on bail may be demanded as a right five days after the first examination for all persons domiciled in the locality—a provision which of course generally puts foreigners out of court. If the Judge refuses bail the prisoner can appeal from prison to the *Chambre des mises en accusation*, a branch of the Court of Appeal—this is the nearest approach to our Habeas Corpus—but he will have to make out an overwhelmingly strong case to induce that Court to interfere with the Judge. Practically, as was before stated, the Juge d'instruction is supreme.

Let us now suppose that the preliminary investigation known to French law as '*l'instruction*' is terminated, and the Judge has rendered an '*ordonnance de renvoi*,' that is an order that the case be tried—the committal for trial of our magistrates.

The Procureur-Général—the head of the department of public prosecution who is kept informed of every affair by the Judge of instruction—is officially apprised of the termination of the investigation, and of the decision of the Juge d'instruction. If the charge is a mere misdemeanour the case goes before the '*Tribunal de police correctionnelle*,' a court composed of three judges without a jury. But it will be more interesting to suppose that the matter in question is a crime. In that case it will be sent before the *Cour d'Assises*, where there are three judges of the Court of Appeal and a jury. But there is a preliminary step in this event. The whole case, together with all the evidence and the judges' notes, is sent to the '*Chambre des mises en accusation*,' which proceeds to a more or less cursory examination of the affair; but it is extremely rare that it comes to a different conclusion to the

one arrived at by the Juge d'instruction. It accordingly confirms, in the vast majority of cases, that magistrate's decision, and the case is set down for trial at the next sessions of the Cour d'Assises.

By this time the prisoner has frequently been in custody six months or longer, and by the time he emerges from the gloom of his prison into the glare of the Assise Court he is more like a hunted animal than a human being. But torturing in the extreme as have been his numerous interviews with the Juge d'instruction and other incidents of the investigation, such as, in murder cases, the horrible 'confrontation' with the corpse of the victim with which he is brought unexpectedly face to face, so that the Juge d'instruction, the detectives and the Public Prosecutor, who is generally present on these occasions, may note upon the face of the shrinking, cowering wretch before them the outward signs of his guilt—inexpressibly torturing as must have been all these incidents of the investigation, the last stage is by far the most terrible ordeal of all.

Anybody who, like the present writer, has seen a miserable French criminal in a murder trial seated between two stalwart gendarmes in the dock of the Paris Cour d'Assises, the bright red robes of the Judges and the Ministère Public standing out vividly in the otherwise 'dim religious light' of that gloomy chamber of horrors, and watched him fight for his life in desperate verbal encounters with the President, and his miserable attempts to cross-examine the witnesses, generally degenerating into virulent abuse, has witnessed a spectacle of a very unedifying nature which he is not likely to forget. The rôle of the President of the Court is the most remarkable part of a French criminal trial. Theoretically he is supposed to be quite impartial, and to keep the balance between the Ministère Public, that is the prosecution, on the one hand, and the prisoner on the other. Practically he does nothing of the kind. In proof of this last observation I may quote the following passage from the 'Gil Blas' of Jan. 1st, 1891:—

'The impartiality of the President seems to me an absolute farce. It is agreed on all hands that the President ought to be impartial, and no one dares to assert that in reality he is not. The following dialogue is a fair specimen of what regularly takes place at every session of the Assise Court. When the President has gone too far—and Heaven alone knows what constitutes going too far!—the counsel for the defence objects. Thereupon the President sits up in his chair, adjusts his pince-nez, and scornfully replies, "I suppose, Maître So and So, you don't doubt the impartiality of the President?" Counsel hastens to protest that such an idea never entered his head; and the President triumphs—naturally. Were

the barrister to make any further objection he knows only too well the penalty—withdrawal of his right to address the Court, suspension from his functions, and not improbably a prosecution for insulting the magistracy. It is the old story of the man brandishing a big stick in the face of his child and exclaiming, "If you don't say I'm the best of fathers I'll whop you within an inch of your life. . . . And now, what do you think of me?"

The usual line of the President's examination of the prisoner (known as the 'interrogatoire') consists simply in a series of statements much in the following manner:—

'President.—On the 27th of March you returned home late at night?

'Prisoner.—It's false! I never went home on that night.

'President.—Silence! Don't add to your crimes by fresh lies. I say you went home,' &c.

Frequently the President takes no notice whatever of the prisoner's replies, but pursues his course of statements with unruffled composure. At the close of this examination—which is a matter with which the Judge and the prisoner are solely concerned, without any intervention of counsel, and which in the case of a clever prisoner, fighting with more energy and hope of success than most of them display, frequently resolves itself into a very sharp intellectual tussle—comes the examination of the witnesses. This too is conducted almost entirely without the assistance of the 'avocats.' The witness advances to the bar, which is simply a rail in the middle of the court, gives his name, age, &c., swears to speak the truth by holding up his right hand, and then receives from the President the injunction 'Dites ce que vous savez' (Tell us what you know), which he then proceeds to do, generally in a very garbled and more or less unintelligible manner. Everything is evidence for what it is worth, hearsay opinion, and the wildest flights of a disordered imagination.

Counsel for the prisoner may ask any questions on obtaining permission from the President, but anything like systematic and artistic cross-examination is unknown in France. Then the Avocat or Procureur-Général addresses the jury. This is called the 'réquisitoire,' and is generally an impassioned appeal to the jury, in which the case is put in the blackest possible light for the prisoner, and the jury are asked to convict him of the gravest charge in the indictment. The Public Prosecutor takes little part in the trial until this speech, though he may intervene at any moment, and not unfrequently apostrophises the prisoner, as when in the recent trial of an officer on a charge of murder the latter

was seen to smile at one of the depositions, whereupon the *Avocat Général* exclaimed, 'Vous riez, misérable, mais vous ne rirez pas sur l'échafaud!'

The most important part of his rôle, however, is not his speech in court, but the drafting of the indictment, or '*acte d'accusation*,' with the reading of which by the *Greffier* or Clerk of the Court the proceedings are opened. The compilation of this document is the work of the Department of Public Prosecution, and it is indeed a work of art, being a history from the point of view of the prosecution not only of the crime in question, but of the entire antecedents of the prisoner, often from his infancy, in which every conceivable circumstance that can be raked up against him is duly chronicled in the most damning colours, any former sentences set forth, and everything possible done to influence the minds of the jury adversely to the prisoner.

The '*réquisitoire*' ended, if there is a '*partie civile*,' the counsel of that party addresses the jury. A '*partie civile*' is any person injured by the crime who demands damages—if only to the extent of one franc—in consequence thereof. To constitute oneself '*partie civile*' is moreover a method often employed in order to obtain a *locus standi* in the case when it is desired to be able to refute accusations which the prisoner's counsel is thought likely to make in the course of the case.

After the speech for the '*partie civile*' comes the turn of the counsel for the defence, who in a French trial always has the last word. Then the questions are put to the jury by the President. There is no summing up since 1881, when the President's *résumé* was abolished as being calculated to interfere with the free exercise of their discretion by the jury.

The questions which the jury have to answer are often exceedingly numerous. I have known as many as eighty-seven questions left to a French jury. Fortunately, they are not obliged to be unanimous; a simple majority is sufficient. The functions of a French jury are quite different to those of our own twelve 'good men and true,' and if space permitted it would be interesting to compare and contrast their respective duties. It must suffice, however, to mention here two of the most notable differences. In the first place French juries are more than judges of fact, inasmuch as their discretionary power is practically unlimited. Suppose a murder proved beyond the possibility of a doubt, the murderer being taken red-handed. An English jury could not possibly acquit, for all they are asked is, 'Did the prisoner commit murder on such and such a date in such and such a manner?' But the question left to a French jury is much wider, for though in terms

it is only, 'Un tel est-il coupable d'avoir, &c.,' it is accepted as meaning not only 'Did he actually do the act?' but further, 'Is he in your opinion morally guilty for having done it?' Consequently, if the jury can conscientiously reply to the latter question in the negative, they acquit the prisoner; and that happens every day, as every one who reads the newspapers must be aware.

The second peculiarity of a French jury is its power of according 'extenuating circumstances,' and their abuse of that power is one of the most noticeable features of French criminal trials. Extenuating circumstances are given to prisoners every day who have committed the most revolting crimes under the most appalling circumstances and without the shadow of an excuse or mitigation. The legal effect is to deprive the Court of the power to condemn the prisoner to death, and to give it the faculty of descending two degrees in the scale of penalties. Thus a man indicted for murder and found guilty 'avec circonstances atténuantes' can only be condemned to penal servitude for life, and may only be condemned to penal servitude for five years. The fact is that a vast quantity of Frenchmen are strenuously opposed to the infliction of the death penalty under any circumstances whatever, and by according extenuating circumstances they do no more than register a protest. But it is none the less a flagrant misuse of the power entrusted to them by the law.

The trial being terminated and the prisoner, let us suppose, condemned to death, as does occasionally happen when the panel happens to be fairly devoid of crotchety fanatics, there is always an appeal to the Court of Cassation. As the establishment of a Court of Criminal Appeal in this country is one of the questions of the hour, it may be as well to say a word about the criminal jurisdiction of the Supreme Court of France. As an appeal is made to that Court almost as a matter of course whenever a man is condemned to death by an Assize Court, it is sometimes supposed that the Supreme Court has power to retry the case. Such however is not the case. The Court of Cassation has merely power to quash the sentence of any Court when any formality prescribed by law, on pain of nullity of the proceedings, has been neglected, and as in a criminal trial these formalities are extremely numerous and minute in almost every trial it is possible to discover some more or less trifling deviation from the prescribed forms upon which to found an appeal to the Court of Cassation. But only about one out of six of such appeals is successful. When, however, it does succeed, the Supreme Court sends the affair for trial to the next sessions of another Assize Court, and the whole case has to be tried *de novo*.



From the above sketch of criminal procedure in France it will, I hope, be seen how very different is that procedure from our own. Here the prisoner is never questioned by the Judge nor allowed to interrogate the witnesses; indeed it has only recently become the fashion for prisoners to make statements, not on oath, and the desirability of such statements is a much disputed point among criminal lawyers. Here the prosecution always conducts the case against the prisoner with studied moderation instead of fulminating against him and urging the jury to show him no mercy, a proceeding which usually defeats its own object and has a diametrically opposite effect. Here the Judge sums up the case carefully to the jury, his long experience in sifting evidence enabling him to indicate to them in which direction it tends, though the difference in the functions of the two juries which I have endeavoured to point out would certainly render any such summing up of the evidence as obtains in our Courts of very little value to a French jury. Finally the discretion of the Judge as to the punishment to be inflicted is infinitely greater here than in France, and necessarily so, where the power of the jury is so much more circumscribed.

I have often heard it stated—indeed it was gravely affirmed quite recently in a leading article of one of our best known morning dailies—that whereas in England a prisoner is deemed to be innocent until his guilt is proved, in France he is presumed to be guilty until he has demonstrated his innocence. There is not a shadow of foundation for such a statement in law, and a French lawyer would be aghast at the enunciation of such a proposition. But from a practical point of view the assertion is not wholly unwarranted. For though theoretically the burden of proving the guilt of the prisoner is always on the ‘parquet’ or public prosecuting department, yet in practice the habit of endeavouring to force a prisoner to confess—a proceeding which is so opposed to the spirit of our own procedure that English law, as is well known, makes any confession so obtained incapable of being given in evidence—has the effect of tending to warp the judgment of the persons engaged in France in the investigation of crime, while on the other hand the lengthy enquiry by the Juge d’instruction with all its ‘confrontations,’ ‘reconstitutions de la scène du crime,’ &c., &c., has the effect, unavowed no doubt, but nevertheless often observable, of prejudicing the prisoner who is eventually sent for trial before them in the eyes of the Judges of the Cour d’Assises.

Such, roughly speaking, is criminal procedure in France, and it is by no means devoid of its good points.

There is no doubt that our own procedure errs in two particulars

wherein the French system is much more rational. First, in our almost morbid horror of inducing the prisoner to say anything 'which may be used against him at his trial,' whereby there is small doubt that the guilty often escape without any adequate corresponding advantage to the innocent. Secondly, in the extremely complicated and often unreasonable nature of our highly technical rules of evidence, whereby information which is really relevant is frequently rendered inadmissible in evidence. However, there will not probably be among English readers two opinions as to which system is on the whole best calculated to ensure at once the discovery of the truth in any given enquiry and in general a humane and enlightened administration of justice.

MALCOLM McILWRAITH.

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*SMITH v. BAKER AND VOLENTI NON FIT INJURIA.*

THE short point for decision by the House of Lords in the recent case of *Smith v. Baker and Sons*<sup>1</sup> was, whether, when the plaintiff had admitted his knowledge of a risk which ultimately brought injury to him, the judge ought to have nonsuited, and not to have allowed the case to go to the jury. It is proposed to shew that the decision of the House of Lords, holding that the case was rightly left to the jury, was inevitable in view of established principles of law and the way in which this particular case was presented to the House, while at the same time much of the reasoning by which the result was attained is extremely unsatisfactory.

At the outset, however, of some remarks, which may not strictly be confined to mere thankfulness and laudation, it is possibly not too venturesome to anticipate that, notwithstanding the substantial harmony of the result with the course of preceding decisions, the case will not give complete satisfaction; either to those who look at it otherwise than as the means of securing payment, to a probably very deserving man, of a sum in satisfaction of very severe hurts received whilst doing his master's business; or to those whose ideal of a decision in the House of Lords is one of the closely reasoned demonstrations that make the L. R. H. L. series such stimulating reading for a lawyer.

In *Smith v. Baker*, the workman's engagement was at work in full view of the risk from which he months after received his injury. Two months previous to the accident he was put to the work itself to which the risk was attached, and worked on at it without complaint till he was injured. It may be mentioned that Lord Watson notes that 'one at least of his fellow workmen had previously complained to the foreman of the danger;' though there is no suggestion that it was with the plaintiff's authorization or concurrence. The comment of the ordinary observer without prejudices in the matter of the liability of master to servant on the facts proved in *Smith v. Baker* would probably be that, if ever there could be a case of a man working with his eyes open and taking the risks of his work, this particular case of *Smith v. Baker* is that case. The ways of juries, however, with Railway Companies, newspapers, and employers, presumptively wealthy, are uniform; and as a learned judge, whose decisions have helped as much as any

<sup>1</sup> (1891) A. C. 325.

to consolidate the prerogative of juries to mete out compensation on philanthropic principles very lately observed, 'In a case under The Employers' Liability Act there is no chance of an employer getting a verdict.'

Again, to a student of law who has studied the House of Lords' Reports of the last twenty years the perusal of the various opinions delivered in this case by the Law Lords may not unlikely suggest the reflection, what an immense and irreparable loss the House suffered when Lord Cairns ceased to attend and mould its judicial deliberations. Compare for example Lord Cairns's leading opinion in *Wilson v. Merry*<sup>1</sup>—an exposition which has been submitted to an altogether exceptional mass of adverse criticism, and which is by no means an adequate specimen of his method and powers, but which has certain analogies with the present case—with any of the opinions delivered in *Smith v. Baker*. There is, first, the statement of facts; then a precise enunciation of the general principle of law applicable in every relevant aspect; lastly, the points in which the case before him failed to meet the requirements of the principle are distinctly and unambiguously pointed out; and pervading the whole there is a rigid elimination of any expression of opinion on matter not necessary for the decision, while every sentence converges on the point to be decided without ambiguity and with the precision of a scientific formulary. On the other hand, in *Smith v. Baker*—surely a case admitting one way or the other of an enunciation of broad principle—in the leading opinions there is apparently not even an effort to state any. 'In the circumstances of this case,' says Lord Watson<sup>2</sup>, 'the question whether he had accepted the risk is one of fact; there is no arbitrary rule of law which decides it.'

There is again a wealth of unnecessary dicta; for example, the Lord Chancellor's theory about 'consent to the particular thing done,' which is wholly unnecessary for the decision. With this compare Lord Cairns's<sup>3</sup>: 'Your Lordships will probably not express any opinion as to whether in some other stage of this action such an argument may, or may not, be maintained; and I only notice it at present in order to shew that it has not been overlooked.' As a final Court of Appeal the function of the House of Lords is to set at rest disputed points, not to stir up or suggest points for disputation.

Lord Herschell's suggestions too about *Thomas v. Quartermaine* appear to be altogether apart from any point raised in the case (or, if they are pertinent to any, the rest of the learned lords must have been at sea in their views of the case), and instead

<sup>1</sup> L. R. 1 Sc. Ap. 32.

<sup>2</sup> (1891) A. C. at 357.

<sup>3</sup> *Wilson v. Merry*, L. R. 1 Sc. Ap. 326.

of preventing litigation, will be regarded as giving at least Lord Herschell's sanction to embarking on it. Moreover there runs through all the opinions, excepting Lord Bramwell's and Lord Morris's, a generality of expression applicable possibly to any case, or may be to no case. For example, take this passage: 'I must say for my part that in any case in which it was alleged that such a special contract as that suggested' (i.e. an agreement 'to undertake the risk arising from the alleged breach of duty,' and 'conclusively established') 'had been entered into I should require to have it clearly shewn that the employed had brought home to his mind the nature of the risk he was undertaking and that the accident to him arose from a danger both foreseen and appreciated'.<sup>1</sup> That is, a special contract, possibly in writing, being 'conclusively established,' the rule of evidence is similar to that sometimes regarded as special to the case of money-lenders dealing with expectant heirs. To what extent then does this eversion of the ordinary onus of proof go? Is it limited to miners and factory hands, or are seamen included? Has it any and what limitations? A proposition of enormous extent is advanced and without the faintest attempt to define its application. In Lord Cairns's days the opinions delivered in the House of Lords moved on an altogether other plane.

Before proceeding to the consideration of the signification of the maxim *Volenti non fit injuria*, it may be well to point out that the cases cited of *Sword v. Cameron*<sup>2</sup> and *Bartonskill Coal Company v. Macquire*<sup>3</sup> were by no means conclusive of the defendant's liability. Those cases, in the view of the Lord Chancellor<sup>4</sup>, 'established conclusively the point . . . that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable.' But it was quite consistent with the defendants' case to admit as much; what they said was in effect—even assuming we have not done all we ought, you have made a contract with us to release us from liability in that particular. The point for the defendants might be put 'admitting default of duty on our part you have agreed not to take advantage of it.' In that case *Sword v. Cameron* would merely establish a stage in the defendants' liability and not conclude it. To conclude it would necessarily be to decide whether in any circumstances the free will of the plaintiff could in law be held to assent to such an undertaking; and secondly, whether the facts proved in the case before the court did shew such assent.

But the main interest in the decision is the light that can be

<sup>1</sup> Per Lord Herschell at p. 363.

<sup>2</sup> 3 Macq. 266.

<sup>3</sup> 1 D. 493.

<sup>4</sup> (1891), A. C. 339.

extracted from it as to the true legal bearings of the maxim *Volenti non fit injuria*. There is no peculiarity in the nature of the maxim *Volenti non fit injuria* which generically distinguishes it from other legal maxims. Legal maxims are the expression of legal presumptions in the circumstances to which they are applicable. As a rule their application may be rebutted; but sometimes, though rarely, they are irrebuttable. This particular maxim embodies what is at once a legal and a philosophical truth, that what a man consents to that he cannot complain of; and admitting that a good foundation is laid for its application no objection appears ever to have been made to its intrinsic justice. The disputes which have arisen with regard to it have been mainly disputes as to the definition of the word *volens*; What goes to the making a willing or consenting person?

Two main views have been urged: first, that consent to the undertaking of a risk is to be presumed from the fact of working in the circumstances of risk—that a man is presumptively *volens* who is found working in circumstances of risk; and second, that working in circumstances of risk is no more than an element in the consideration of whether there is consent to the undertaking of the risk—that a man working in circumstances of risk is not presumptively *volens*, but invites further evidence that he is so. Both these views are in certain circumstances right, though neither can be asserted as an exclusive principle. The difficulties found in settling the rule applicable in any particular case have arisen mainly from the want of recognition, by those urging either of these views, that there is an appropriate place for the assertion of their own principle, without denying validity to what they are pleased to view—but wrongly—as an antagonist principle and which is in truth merely a supplementary one. A discussion may perhaps elucidate what the true line of demarcation is.

In considering the classes of cases to which the maxim is applicable the rudimentary distinction must be borne in mind between the case of a workman expressly engaging to do dangerous work, and the case of a workman not expressly engaging to do dangerous work, but the circumstances of whose continued working in a dangerous environment may warrant the inference that he has engaged himself to encounter the dangers incident to his employment. In the former case—to use the language of Lord Herschell in *Smith v. Baker*<sup>1</sup>—‘a person who is engaged to perform a dangerous operation takes upon himself the risk incident thereto.’ If there is an agreement to encounter a risk, such agreement is legally valid,

<sup>1</sup> (1891) A. C. 325 at p. 360 of the reports in the Law Reports.

and not the less valid because there are circumstances of danger greater than are necessarily involved. As Lord Bramwell says, 'Acrobats daily incur fearful dangers, lion tamers and the like;' but the difficulty arises where the acceptance of risk is not matter of positive agreement, but of inference from conduct only.

This latter class of cases is also susceptible of a twofold division. Those cases where the right of action in respect of which the plaintiff claims is based on some breach of duty by the employer, either by negatively falling short of his obligations, or positively injuriously affecting the conditions of the work; and those cases where the plaintiff's claim is in respect of matters equally apparent to workman and employer existing simultaneously with the constitution of the contract of employment. It may be remarked that, if any risk is not equally apparent to the workman as it is to his employer, there is *ipso facto* a breach of duty in the employer unless he calls his workman's attention to the existence of such risk and its bearings; and such a case would therefore fall under the former class of cases.

Lord Bramwell does not appear to draw any distinction between these classes; and applies an equally stringent rule of liability to both. On the other hand Lord Herschell appears to agree with Lord Bramwell in regarding one rule of liability as applicable to the two classes, but differs widely in his view of what the rule applicable is<sup>1</sup>. Yet, if the two classes of cases are not identical in principle, it is manifest that a method of treatment that does not discriminate them, even if practically satisfactory, which most probably it is not, must, scientifically considered, leave much to be desired and be wanting in a completely accurate adjustment to dissimilar facts.

That the two classes are not identical is plain from this, that the onus of proof in each case is different. For example in the first class, of which *Smith v. Baker* as decided in the House of Lords is an instance, the plaintiff having given evidence of a breach of duty on the part of the employer—the neglect of the defendants to perform their common law duty of remedying 'a faulty system of working the crane'—and damage flowing therefrom, had fulfilled all the law required of him in founding a cause of action; and mere subsequent proof, going no further than to show that the plaintiff was not ignorant of the fact of the breach of duty previously to the damage resulting, was not sufficient to shift the onus from the defendants back again to the plaintiff. On the other hand, to take an early case and the best known of all as an illustration of the second class; in *Priestley v. Fowler*<sup>2</sup>, the plaintiff's claim was in

<sup>1</sup> See pp. 361, 362.

<sup>2</sup> 3 M. & W. 1.

respect of injuries sustained through his master not using 'due and proper care' that a butcher's cart used in the ordinary course of the butcher's business should be 'in a proper state of repair, that it should not be overloaded and that the plaintiff should be safely and securely carried thereby.' In the subsequent case of *Metcalfe v. Hetherington*, Parke B.<sup>1</sup> explains the decision to have been that 'the court considered the allegation of duty as altogether insufficient, the declaration not stating facts from which duty could be inferred.' That being so, on proof of the facts alleged in the declaration no cause of action would be constituted, and consequently there would be nothing to submit to the jury. The duty of the judge would accordingly be to nonsuit. The distinction then between the two classes of cases is that in the one a right of action has vested which must, if at all, be displaced by evidence on the part of the defendant. In the other case there are no facts shewn that warrant calling on the defendant to answer.

But in both cases the plaintiff has been injured through imperfections in the implements supplied by the employer. In the opinion of Lord Bramwell, in both cases the plaintiff would be disentitled to recover. In the opinion of Lord Herschell apparently<sup>2</sup> in both cases he would be entitled to recover. But in the opinion of the overpowering weight of legal authority in one case the plaintiff would be entitled, in the other disentitled to recover, for reasons which we shall now consider.

We have already seen that, where a workman enters on the performance of work the conditions of which are unnecessarily unfavourable to him, and expressly agrees to undertake the work as it is without amendment of its accessories, the law does not interfere with his free action. If he is injured his is the loss, his employer goes free. If this is the law when the intention of the parties is expressed, the law is not different where a similar intention is unambiguously to be implied. In such a case however, if an alteration increasing the risk is made in the circumstances of the work by the employer, *subsequently* to the occurrences from which unambiguous intention to undertake the existing risks would be inferred, the proof of such alteration in the circumstances raises the presumption of breach of duty against the employer, just in the same way as proof of a contract and proof of non-compliance with its conditions *prima facie* raises a cause of action in respect of the non-compliance.

The alteration being made subsequently to the employment, the

<sup>1</sup> 11 Ex. p. 270.

<sup>2</sup> At p. 362: 'It was a mere question of risk which might never eventuate in disaster.'



onus would be on the defendant to clear himself from responsibility for its consequences. Suppose him then to proceed to do this by cross-examination of the plaintiff, and to elicit that the plaintiff knew of his breach of the conditions of the employment before he suffered from them. The onus of proof is not changed by this; for the plaintiff's acknowledgment of knowledge is no more than ambiguous. It may be knowledge on which from many circumstances he might not be able to act, e.g. throwing up his work and complaining to his master at once might jeopardize the safety of many lives; or it might be knowledge which weighed the circumstances of risk and resolved to accept them. If the former, the onus is still undischarged; for it cannot be admitted that a master can apply invincible constraint to his servant, and at the same time claim that he works at his free election. If the latter, then proving it the defendant makes out his point. But whichever it is, at the stage we are now the inference is ambiguous, and it is the defendant's duty to shew one that is unambiguous.

Now where a new risk is imposed in the course of an employment, a workman is entitled to as great a freedom of choice before he is committed to its acceptance, as if he had had the work offered to him originally with the newly attaching risk as one of its incidents. To offer a man work manifestly dangerous is however a far different thing from adding a dangerous element to work on which he is already working. In the former case the employment is on the basis of the acceptance of the risk. In the latter there is a more onerous employment without any corresponding consideration. Viewed purely as a contract the superadded risk is outside the consideration. Besides this, by engrafting a new risk on an employment undertaken free from it, the workman's position is, in two respects, worse than if the same work were offered him as a new engagement. First; work he had undertaken on one set of conditions has to be continued by him under another. The workman may very probably have altered his position for the purpose of undertaking the work, e.g. he may have moved from another district, and taken a cottage at an increased rent to be near his work. The inducement then for him not to throw up his work at once would be disproportionately great to what it was originally to take to it. Second; he is now put to avoid a risk he might never have chosen to encounter—a very different thing.

Once more it seems manifestly unfair and unreasonable to require a workman, so soon as he has knowledge of a danger introduced in his work, straightway to throw it up or to be fixed to its acceptance. But beyond this, even where there is knowledge and appreciation, it is hard to say that the workman should be inflexibly held

to have taken the risk. It may well be that he is under influences which preclude his instant abandonment of his work. His state of mind may not be 'I'll take my chance,' so much as 'I can't get out of this job at once. I must go on for a bit.' For example, a man whose work is at the root of an extensive scheme of working, and whose abdication would paralyse the whole, might not unjustly be considered to continue his working from an influence very closely akin to Lord Bramwell's 'physical constraint,' and not from free election. Lord Watson anticipates and provides against a case of this kind by his statement of the principle. He says<sup>1</sup>, 'When, as is commonly the case, his (the workman's) acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it, unless he knew of its existence and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends in my opinion to a considerable extent upon the nature of the risk, and the workman's connection with it as well as upon other considerations which must vary according to the circumstances of each case.'

Such then seem to be the general considerations involved in the application of the maxim *Volenti non fit injuria*. Their more detailed working out may be better considered in the light of some remarks—wholly obiter—of Lord Herschell in his speech in *Smith v. Baker*<sup>2</sup> on *Thomas v. Quartermaine*<sup>3</sup>. Lord Herschell appears very unfavourably to regard that case, and goes considerably out of his way to express a view detrimental to its authority. 'The accident,' he says, speaking of the accident in *Thomas v. Quartermaine*, 'arose from an operation being performed by him' (the injured person) 'in the neighbourhood of the vats, namely, getting a board which served as a lid from under one of them. As far as appears this was amongst the ordinary duties of his employment, and if it be assumed that there was a breach of duty on the part of the employer in not having vats fenced, as it obviously was, since if there had been no breach of duty it would not have been necessary to enquire whether the maxim *Volenti non fit injuria* afforded a defence, it seems to me it must have been a question of fact and not of law, whether the plaintiff undertook the employment with an appreciation of the risk which arose on the occasion in question from the particular nature of the work which he had to perform.'

<sup>1</sup> At p. 335.<sup>2</sup> (1891) A. C. 365 *et seqq.*<sup>3</sup> 18 Q. B. D. 685.

Lord Herschell, in this passage, seems to have fixed his mind on one aspect only of the maxim—that in which it is used as a means of defence—and to have looked upon that as its exclusive function. To do so is however greatly to distort its meaning. The maxim is not a mere enunciation of a line of defence. It may be and often is that, as where it is invoked as the legal conclusion from circumstances which rebut a right of action already vested. But it is more. It is an universal presumption operative, not merely as a defence, but quite as often, to prevent a defence being necessary. In this view it is a presumption of law that must be rebutted before a plaintiff can establish even *prima facie* any cause of action. This view is clearly put by Brett M.R.<sup>1</sup> In ‘an action by a servant against his master for the wrongful condition of machinery on the premises on which the servant is to act, or of the condition of the means by which the services of the servant are to be fulfilled, if the servant confines the allegations in his statement of claim to alleging the existence of danger in any of these things, owing to the negligence of the master he shews no cause of action<sup>2</sup>.’ ‘If the danger is one which was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action, and as it is necessary that these two things should exist in order to form a *prima facie* cause of action, it is necessary they should be shewn to exist in the statement of claim<sup>3</sup>.’ And Bowen L.J., dealing by anticipation with the very assumption made by Lord Herschell, says in the same case, ‘For the plaintiff it was contended that his knowledge was a mere matter of defence, and that it should so appear as a matter of pleading, but that is not true, for the old form of declaration, as I have already pointed out, must have shewn ignorance on the part of the servant.’ Fry L.J. adds very briefly, ‘It appears to me to be plain that the knowledge of the master and the ignorance of the servant are necessary to form the cause of action.’ This, moreover, is no new law, but, as a reference to the case quoted from and the cases referred to therein will shew, law so completely settled and established as to be indisputable. In the circumstances indicated then two allegations are necessary to form a right of action—knowledge of the master and want of knowledge of the servant. But knowledge by the servant without anything further, the mere fact of knowledge unaided by any legal doctrines or presumptions, would not disentitle him from recovering. Knowledge is in this case significant as it draws with it the application of the maxim *Volenti non fit injuria*. From knowledge—mere knowledge—the fact

<sup>1</sup> *Griffiths v. London and St. Katharine Docks Co.*, 13 Q. B. D. at 260.

<sup>2</sup> *Priestley v. Fowler*, 3 M. & W. 1.

<sup>3</sup> At p. 261.

of being *volens* is presumed; from being *volens* the application of the maxim is further implied.

If this is a correct analysis of what is required to be stated in a pleading to found a right of action, much more must evidence of want of knowledge be given by the workman at the trial, else he fails to substantiate a material element in his cause of action. But since we see that ignorance of an apparent danger existing at the time of entering on an employment will not be inferred, it follows that a workman is presumed in law to have knowledge of it; and this presumption draws after it, without any subtle considerations whether the man appreciated the risk in addition to having knowledge of it, the presumption that the maxim applies. If his case then is that he knows the danger but does not appreciate the risk, he must be nonsuited, unless he specifically raises the point and gives evidence of it in a way the law allows; for the presumption of law is against him and must be rebutted before any right of action can arise.

This absence of any case to go to the jury was the plain ground of the decision of the Divisional Court in *Thomas v. Quartermaine*. To use the language of Lord Herschell, with the substitution of a distinct negative for his affirmative, 'It obviously was' not 'assumed in *Thomas v. Quartermaine* that there was a breach of duty on the part of the employer in not having the vats fenced.' Wills J. indeed expressly says, 'Even supposing there was any risk arising from the passage being narrow, that risk was one which the plaintiff could understand as well as anyone else could, nor could the employer know nor ought he to know anything more about either the nature or extent of the risk than the plaintiff himself.' That is, in the opinion of Wills J. there was no breach of duty at all on the part of the employer. Breach of duty was not merely not assumed, it was distinctly negatived. From this it followed that the plaintiff, of the two ingredients to a cause of action, knowledge of the master, and ignorance of the servant, shewed the presence of only one of them. In such circumstances no cause of action is shewn, and therefore there was nothing to leave to the jury.

Had Lord Herschell's alleged breach of duty existed, a right of action in respect of it would have already accrued to the plaintiff. If then the defendant wished to displace it by invoking the maxim *Volenti non fit injuria*, it could be only as matter in defence which could not be withdrawn from the jury.

The implication from what Lord Herschell says<sup>1</sup>, though he nowhere expressly and distinctly formulates the proposition, is that

<sup>1</sup> (1891) App. Cas. at pp. 365, 366.

the question of knowledge or no knowledge is in every case for the jury. As a broad proposition this is just as false as the co-ordinate expression that the question of knowledge or no knowledge is for the judge would be if stated without regard to its limitations. Both propositions are equally true, however, when properly limited. As we have seen, the law presumes knowledge in the plaintiff of dangers in the work on which he accepts employment, till he has given evidence to negative the presumption. If this is not given it is for the judge to say that the facts as they appear infer knowledge on the part of the plaintiff; it then becomes the judge's duty to direct a nonsuit; and if he fails in this the Court of Appeal will redress his omission. When, on the other hand, the plaintiff has dispelled the presumption of knowledge he, so far as this point goes, has raised a presumption of breach of duty on the defendant's part. One of the lines of defence then the defendant may adopt is to attempt to shew, as in *Smith v. Baker*, that though the circumstances as detailed in evidence in chief led to the conclusion that there was a breach of duty, still admitting that, for the purposes of this special point, the plaintiff had waived his rights thus arising and was within the presumption expressed by the maxim. On the one side then there would be evidence of the breach of duty, which if uncontradicted would entitle the plaintiff to recover: on the other side there would be some evidence of acceptance of the conditions of working—and thus a conflict of evidence on a question of fact would be produced—which, whatever may be the opinion of the judge who tries the cause, as to its preponderating weight on one side and absolute insignificance on the other, must in accordance with the opinion of the majority of the House of Lords in *Dublin, Wicklow and Wexford Railway Company v. Slattery*<sup>1</sup> be decided by a jury.

So much then on Lord Herschell's view as to the application of the maxim *Volenti non fit injuria*. It may, however, be worth while to follow out his further criticisms on *Thomas v. Quartermaine*. 'If,' Lord Herschell continues, 'the effect of the judgment be that the mere fact that the plaintiff after he knew the condition of the premises continued to work and did not quit his employment, afforded his employer an answer to the action, even though a breach of duty on his part was made out, I am unable for the reasons I have given to concur in the decision.'

Lord Herschell *assumes* that the condition of the premises was altered after the commencement of the plaintiff's employment.

<sup>1</sup> 3 App. Cas. 1155. [Subject to the question of the verdict being against the weight of evidence, which in that case, as in *Smith v. Baker*, could not, as it happened, be raised on the appeal.—Ed.]

But as the cases already noted<sup>1</sup>, and the whole body of decisions on the point intermediate between the dates of the two decisions, shew, where there is no evidence given to shew whether a risk was existing before or added subsequently to a plaintiff's entering on an employment, the presumption of the law is that the employment was accepted subject to the risk. Now nowhere throughout the reports of *Thomas v. Quartermaine* is there any suggestion of evidence that the risk was a superadded one. The facts not only do not point that way, but the very other. 'Evidence was given by the defendant to shew that it was not usual to fence cooling vats.' Lord Herschell, to point his strictures, assumes further 'a breach of duty.' Now this 'breach of duty' must either have been having the cooler unfenced, or having the board put in too tight. There was nothing to shew that if the latter was the breach of duty it was not the plaintiff's own act or at least the act of a fellow workman. In neither case, either at Common Law or yet under the Employers' Liability Act, 1880, would the plaintiff be entitled to recover. Again, in the words of Lord Halsbury C. in *Members v. Great Western Ry. Co.*<sup>2</sup>, 'The thing done is done by himself; he does not contribute to it, but he does it; he puts the thing in motion.' And the same criticism on the plaintiff's action in *Thomas v. Quartermaine* is made in *Smith v. Baker* by Lord Morris<sup>3</sup>: 'He was not directed to get the board; he did it of himself.'

If, however, the defect was not having the cooler or vat fenced, what duty was violated? As Lord Campbell said in *Seymour v. Maddox*<sup>4</sup>, the facts of which seem not a little in point: 'In this case there is an allegation that it was the defendant's duty to light the floor and fence the hole, but no facts are alleged from which the duty arises. The express allegation therefore will not help the defect.' Lord Campbell's successor, Cockburn C.J., was commonly regarded as a judge not slothful where humanity was concerned; and in *Clarke v. Holmes*<sup>5</sup> in the Exchequer Chamber his expressions went beyond what great judges like Mr. Justice Wightman and Mr. Justice Willes could adopt; yet speaking with reference to 'an employment from its nature necessarily hazardous,' which is scarcely an apt description of the employment in *Thomas v. Quartermaine*, he says, 'If he (the workman) thinks proper to accept an employment on machinery defective from its construction, or from want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the

<sup>1</sup> *Priestley v. Fowler*, (1837) 3 M. & W. 1; *Griffiths v. London & St. Katharine Docks Co.*, (1884) 13 Q. B. D. 259.

<sup>2</sup> 14 App. Cas. 179.

<sup>4</sup> 16 Q. B. 326.

<sup>3</sup> (1891) A. C. at 369.

<sup>5</sup> 7 H. & N. 937.

servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment<sup>1</sup>. Lord Herschell's view of the law may very possibly be correct if the plaintiff's position was that of one continuing at work after an alteration made in the circumstances of the work; but it has been pointed out already that this is a mere unsupported suggestion invalidatory of the decision; while the presumption of law is in favour of the contradictory hypothesis.

But does the Employers' Liability Act, 1880, alter the position in favour of the workman? By virtue of sec. 2, subsec. 2 of that Act a workman has no right to compensation for injuries caused by reason of any defect or negligence which is specified in sec. 1 in any case where 'he knew of the defect or negligence which caused his injury and failed within a reasonable time to give or cause to be given information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.' In other words, under the Employers' Liability Act, 1880, mere knowledge will in the circumstances indicated by the section raise a presumption of the application of the maxim where at Common Law, as is pointed out by Lord Watson<sup>2</sup>, the workman's rights are greater than they are under the Act. 'At Common Law,' says his lordship, 'his (the employer's) ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favour of the employer; but as was forcibly pointed out by Lord Esher M.R. in *Thomas v. Quartermaine*, in cases where the employer and his deputies were personally ignorant of the defect, it is made a condition precedent of the workman's right to recover that he shall have given them information of it before he was injured.' Thus so far from the Employers' Liability Act, 1880, adversely affecting the master's position in the matter now under consideration, in one very important respect the master's position is made stronger under it than it is even at Common Law.

It has been claimed, probably on the strength of Lord Herschell's remarks, that the House of Lords in *Smith v. Baker* 'overruled'

<sup>1</sup> With reference to the present point it may be noted that in *Thomas v. Quartermaine* Lord Esher M.R., the dissenting judge, there speaking of *Holmes v. Clarke* says, 'It is binding on us, and moreover it is in my opinion rightly decided,' 18 Q. B. D. at 690. For other statements of the law to the same effect see per Kelly C.B. delivering the judgment of the Exchequer Chamber in *Indermaur v. Dames*, L. R. 2 C. P. 311 at 313. See also Montague Smith's remark in the same case, L. R. 1 C. P. at p. 282, and two Irish cases, *Smyly v. The Glasgow & Londonderry Steam Packet Co.*, 2 Ir. C. L. R. 24, *Sullivan v. Waters*, 14 Ir. C. L. R. 460.

<sup>2</sup> P. 356.

*Thomas v. Quartermaine*. It is worthy of remark that Lord Herschell's is the only opinion in which any doubt is expressed as to the stability of that decision. On the other hand Lord Morris expresses his entire agreement with the decision<sup>1</sup>, and on grounds which have already been touched on in this paper.

The Lord Chancellor in his judgment has—perhaps unfortunately—introduced a new ambiguous expression and on a point not yet touched on amongst the disputable propositions collected under the shadow of the maxim *Volenti non fit injuria*. 'For my own part,' he says<sup>2</sup>, 'I think that a person who relies on the maxim must shew a consent to the particular thing done;' and again<sup>3</sup>, 'I am of opinion myself, that in order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself.' The Lord Chancellor's expression is not felicitous, whatever his meaning. Moreover his meaning is doubtful. He may mean that where an employment is rendered dangerous knowledge generally of the increase of the danger will not disentitle a workman subsequently injured from recovering, but his attention must be specially called to the circumstances of the increased risk. For example, in *Smith v. Baker*, when the plaintiff first entered the employment his engagement was 'to fill skips or crates with stones which were to be lifted by a steam crane in order to be put into waggons.' While at this work he had an opportunity of observing that the crane when raising stones was sometimes swung over men while working and without notice to them and of concluding that this was dangerous. If Lord Halsbury's words mean no more than that notice of danger obtained in such circumstances was not to be construed into a consent to encounter the danger when the workman's work was altered and he was set beneath the crane, they express little more than a truism and merely add a possible additional ambiguity to the already too numerous ambiguous dicta. But 'to shew a consent to the particular thing done' may mean greatly more than this.

The illustrations of Lord Abinger in his well-known judgment in *Priestley v. Fowler* may well, with some limitations, be pointed to the Lord Chancellor's new-found principle. 'The footman, therefore, who rides behind the carriage may have an action against his

<sup>1</sup> See at p. 369.

<sup>2</sup> At p. 336.

<sup>3</sup> At p. 338 Lindley L.J. uses the phrase 'to incur a particular danger;' it does not appear plausible to assume the Lord Chancellor meant the same thing when he speaks of shewing 'a consent to the particular thing done.' A particular danger may arise from a whole class of acts; 'a particular thing done' seems altogether singular.



master for a defect in the carriage owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker. . . . The master, for example, would be liable to the servant for the negligence of the chamber-maid, for putting him into a damp bed ; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself ; for the negligence of the cook, in not properly cleaning the copper vessel used in the kitchen ; of the butcher, in supplying the family with meat of a quality injurious to the health ; of the builder, for a defect in the foundation of the house, whereby it fell and injured both the master and the servant by the ruins.' For these and all other like calamities it seems the opinion of the Lord Chancellor that the master is liable till he can 'shew a consent to the particular thing done.' If this be indeed his meaning it is obvious that such an interpretation wholly transforms what has hitherto been looked on as the law. A man may and often does consent to work in a general danger—to take the risk of an employment. It would be marvellous to find one who consents to 'the particular thing' that injures him. His consent to the risk is on the chance of 'the particular thing' never coming off.

When a man enters on the performance of dangerous work the underlying condition is that the operations attending the work are performed in the ordinary and usual way. If they are, and the workman is injured and complains that 'the particular thing' had not been pointed out to him, the answer seems plain and conclusive. 'The work has been carried out in the ordinary and usual way ; and this you consented to as I have already proved ; or if it has not, it is for you to point out that it has not. You entered on the work on those conditions, and so it must be presumed against you that they have been performed. You cannot, now that you are injured, call upon your master to prove you consented to "the particular thing" which injured you—he having already proved you undertook the general risk.'

The stress of proving 'consent to the particular thing done,' it is obvious, cannot arise till after consent to encounter the ordinary dangers of the employment has been proved, and so far as it is one of these ordinary dangers would, therefore, seem to need no further proof ; it is proved—not as 'a particular thing done' but as one of the ordinary risks of the employment ; so far as it is not one of these it would come under quite different principles from what we have been here considering ; and thus in either view the Lord Chancellor's principle is unnecessary ; or to phrase the matter somewhat differently—in one view what has always been said before is said again in an embarrassing way ; while in the other

to give scope for its application all the inconvenient cases from *Priestley v. Fowler* downwards must first be overruled.

Lord Bramwell's principle of 'physical constraint' must not be passed unnoticed. The most uncompromising statement of it is found in his speech in *Membery v. Great Western Ry. Co.*<sup>1</sup>: 'I hold that where a man is not physically constrained where he can at his option do a thing or not, and he does it, the maxim applies;' but the same notion runs through what he says in *Smith v. Baker*. As a philosophical thesis this may be correct. The just man in the abstract doubtless realizes Lord Bramwell's opinion of him.

'tenacem propositi virum  
non civium ardor prava jubentium  
non vultus instantis tyranni  
mente quatit solida.'

Neither his employer nor his trade union makes him dismayed. But the ordinary unskilled labourer of daily life is not so graciously fortified. He is not infrequently dense—exceedingly, and imprudent as a child. His most probable attitude in the circumstances Lord Bramwell involves him in is neither consent nor dissent, but hopeless, helpless vacillation, till his trade union decides for him. On analogous grounds to those on which the law favourably views the case of young persons—whose privileges, at least, Lord Esher is not disposed narrowly to circumscribe—the law should pay regard to the average mental state of day-labourers. To mete out law regulated by inflexible logic to that class of the community whose habits are most formed by convention and least by logic, would be to apply a standard to which in fact it never conforms. But even as a logical test Lord Bramwell's principle does not fulfil its requirements. If he means that a man working at dangerous work is *volens* unless he is actually working in bonds—his phrase is 'physically constrained'—he is suggesting a test practically impossible in modern civilized life. To propose such a test as actual physical constraint is to suggest that all cases of working in presence of a danger involve consenting to the risk of the danger; and since 'physical constraint' is the only exculpatory circumstance the principle is tantamount to the imposition of an irrebuttable presumption of voluntary working. But never yet has such a principle been even alluded to in an English case. Whether a man is *volens* or not has always been a matter to be determined by evidence, and that too not confined to any narrow issue.

On the supposition that Lord Bramwell's principle of 'physical constraint' means less than actual physical constraint, its limits are not necessarily different from those of the principles considered

<sup>1</sup> 14 App. Cas. 179 at 187.

in this paper. All society, philosophers tell us, rests ultimately on physical force. Men generally would not work but with the threat of hunger as a final sanction to constrain their idleness. If actual physical constraint is not meant, the alternative is a present power of constraining. But the existence of this is most often not a question of fact but of opinion. The moral and physical condition of the individual is more largely operative in determining what is a present power of constraining than any objective influences whatever. The individual, his self-confidence, his apprehensions are the prime factors to be reckoned with. Different minds will judge very differently of the same external circumstances. Some will be driven to madness by apprehensions, which others will go through wholly unperturbed. But once admit the relevancy of influences on the mind and there is an end, so far as it has any special application, of Lord Bramwell's theory of physical constraint.

The probability, however, is that Lord Bramwell did not regard it as a principle applicable in this class of cases universally; and the paradoxical expression in which he indulged was no more than the result of the revulsion in his mind from what he may have regarded as too great prominence accorded to that view of the maxim *Volenti non fit injuria* which looks at it as a formula of a defence and not as a legal presumption. In his view of the facts in *Smith v. Baker* 'the work was unchanged in character and was the same when he (the plaintiff) entered the service as when he was hurt<sup>1</sup>;' and thus viewed the plaintiff was suing in respect of an injury, the risk of which he was paid to incur. He was in Lord Bramwell's view of the facts in the same position as the plaintiff in *Griffiths v. London and St. Katharine Docks Co.*<sup>2</sup> In such circumstances we have seen how strong the presumption of law against the plaintiff is; and if Lord Bramwell's proposition is that actual physical constraint can alone justify a man in undertaking an employment subject to a manifest risk, and then suing his employer for injury resulting from what he had full in view when he undertook the work, the main ground of objection to the proposition appears to be that it tends unduly to narrow the means of proof rather than that it asserts a proposition 'unsound in its practical working. The majority of the House of Lords viewed the use of the maxim in *Smith v. Baker* as an attempt to oust an already vested right of action, and so regarded, the considerations Lord Bramwell was led by became inapplicable.

The sole point actually decided in *Smith v. Baker* is that, where a workman is engaged in work not in its own nature dangerous,

<sup>1</sup> At p. 346.

<sup>2</sup> 13 Q. B. D. 259.

he is not concluded from recovering for an injury received from dangerous surroundings, which it is not necessary he should appreciate for the purposes of his work, merely by having gone on with the work he was engaged to do with the risk from which he receives the injury full in front of him.

THOMAS BEVEN.

[In *Smith v. Baker*, as I read it, the danger was not the necessary danger involved in stones being swung over the workmen's heads, but (according to the finding of fact not open to review) the unnecessary danger of their being less firmly secured in some way than they might and ought to have been.

*Thomas v. Quartermaine* is not overruled, but it was really, as Lord Morris pointed out, a case of no negligence at all.

Lord Bramwell's theory that there is no difference between knowledge, assent, and consent, has the merit of robust simplicity, but has never been the law of any civilized country.—ED.]

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## TRUSTEESHIP AND AGENCY.

**W**E are so accustomed at the present day to the system of trusts as a convenient way of separating the legal from the beneficial ownership of property, that we are apt to forget that at one time trusts were largely employed to evade liabilities and other troublesome incidents attaching to the legal ownership of land. A long series of Acts of Parliament, from the Statute of Uses to the Intestates' Estates Act, 1884, have removed the most important anomalies arising from the invention of uses and trusts. For the purposes of execution, bankruptcy, dower, and taxation, there is now no difference in theory between legal and equitable beneficial ownership, although the preambles of the earlier statutes show that then, as now, the rights of creditors were often in practice defeated by secret trusts.

These statutory alterations in the law relating to equitable ownership leave untouched the general principle that a trustee, as regards all the world except his cestui que trust, is absolute owner of the trust property, while the cestui que trust has no rights and is subject to no liabilities, except as between him and his trustee. It is obvious that such a theory, if carried to its full extent, would open the door to grave abuses, and accordingly certain exceptions have been established, all of which may be referred to the rule laid down by Mr. Lewin, that 'the court will not permit the system of trusts to be directed to any object that contravenes the policy of the law'.<sup>1</sup> The rule so stated is somewhat vague, and it may be useful to examine its limits.

It is clear that if a person attempts to create a trust for an immoral or illegal purpose, the court will neither enforce the trust nor restore the property to the person who attempted to create it. There appears to be an exception to this rule in cases where the illegal purpose has not been carried out.<sup>2</sup> How far an attempt to evade the provisions of an Act of Parliament constitutes an illegal purpose is a question on which the authorities are conflicting.<sup>3</sup>

<sup>1</sup> Lewin on Trusts, 96.

<sup>2</sup> *Birch v. Blagrave*, Amb. 264; *Platamone v. Staple*, G. Coop. 250; *Cecil v. Butcher*, 2 J. & W. 565; *Symes v. Hughes*, L. R. 9 Eq. 475; *Great Berlin Steamboat Co.*, 26 Ch. D. 616. According to some authorities this exception also applies to illegal contracts which have not been wholly or partially performed (see *Taylor v. Bowers*, 1 Q. B. D. 291), but the recent case of *Kearley v. Thomson* (24 Q. B. D. 742) throws some doubt on the point.

<sup>3</sup> See *Callaghan v. Callaghan*, 8 Cl. & F. 374 *Brackenbury v. Brackenbury*, 2 J. & W.

Again, where a person has acquired property subject to onerous personal liabilities, he cannot retain the benefit and escape the liabilities by transferring the property to another person as his trustee or nominee, if the transfer is made for that purpose. This rule is most frequently applied in the case of colourable transfers of shares in companies, but it has also been applied in the case of leases. Thus in *Philpot v. Hoare*<sup>1</sup>, Lord Hardwicke held an assignment of a lease to be fraudulent because it was made to a man of straw as agent or trustee for the assignor with the object of evading liability for the rent. In *Fagg v. Dobie*<sup>2</sup> an assignment with a similar object was held to be valid because it was made absolutely, without the reservation of any benefit for the assignor, and this case was approved in *Ex parte Hepburn*<sup>3</sup>, where the court declined to recognise an assignment of an under-lease made to an impecunious person to enable him to take a vesting order under s. 55 of the Bankruptcy Act, 1883 as trustee for the under-lessee and thus give the under-lessee the benefit of the lease without its burdens. The principle of these cases, however, does not apply to a person who has never entered into a personal engagement with reference to property, and the question whether he can enjoy the benefit of it without being subject to its burdens involves other considerations. Here again the question is of importance chiefly in connection with shares in companies and leases, but it has also arisen in the case of a business carried on by executors or trustees.

As regards shares in companies, there is no doubt that if a person who is really trustee for another is registered as shareholder of a company, the trustee is the only person to whom the company can look for payment of calls<sup>4</sup>. Similarly in the case of a lease held on a trust, the general rule is that the trustee is personally liable in respect of the rent and covenants, and that the cestui que trust is not. And in the case of trustees carrying on a business for the benefit of their cestuis que trust, the creditors must as a general rule look only to the trustees for satisfaction of their claims. The principle in all these cases appears to be that the liability of the trustee arises out of an express contract, and that the creditor can only look to the person with whom he has contracted and to whom he has presumably given credit. Here are, however, some exceptions to the rule.

A. If a shareholder in a company transfers his shares to an

391; *Childers v. Childers*, 3 K. & J. 310; 1 De G. & J. 482; *Groves v. Groves*, 3 Y. & J. 163; *May v. May*, 33 Beav. 81; *Barton v. Muir*, L. R. 6 P. C. 134; *Tooth v. Powner*, (1891) A. C. 284; *Harding v. Comm. of Land Tax*, *ibid.* 446.

<sup>1</sup> 2 Atk. 219.

<sup>2</sup> 3 Y. & C. 96.

<sup>3</sup> 25 Q. B. D. 536.

<sup>4</sup> *Bugg's case*, 2 Dr. & Sm. 452; *In re European Society*, 8 Ch. D. at p. 708. See also *New London &c. Bank v. Brocklebank*, 21 Ch. D. 302.

infant (the company not being aware of the infancy), the transferor remains liable on his shares; and if a person purchases shares on the market and has them registered in the name of an infant, he is liable to be put on the list of contributories<sup>1</sup>. It is assumed by text-writers<sup>2</sup> that if a person subscribes for shares in the name of an infant he is liable to be put on the list of contributories in respect of them. The precise point does not appear to have been decided<sup>3</sup>. By an extension of the same principle, if a person purchases shares on the market in the name of an infant (the vendor not being aware of the infancy) the vendor is entitled to be indemnified by the real purchaser against the liability to which he remains exposed by reason of the shares being registered in the name of the infant<sup>4</sup>. And although a bona-fide and out-and-out transfer of shares relieves the transferor of liability, yet to be good 'it must be an out-and-out transfer and it must be bona fide': if it is made solely for the purpose of evading liability the better opinion is that the transferor remains liable<sup>5</sup>. In all these cases either there was privity of contract between the contributory and the company, or the contributory had made use of what was practically an alias or dummy name, being that of an irresponsible person. The principle, however, has not been extended to the case of a purchase of shares on the market in the name of a man of straw, even if the shares are put in his name for the purpose of escaping liability<sup>7</sup>, so long at least as there is not any misdescription or misrepresentation. Thus in *Williams's case*<sup>8</sup> a person who had purchased shares on the market gave as the name of the transferee that of a foreman in his employment: in the transfer the foreman was described as a gentleman, and the address given was that of his master's works. The transfer was approved by the directors. On the company being wound up the liquidator applied to have the master put on the list of contributories, but Jessel M.R. refused the application, on the ground that the master had entered into no contract with the company and had been guilty of no misrepresentation. The Master of

<sup>1</sup> *Richardson's case*, L. R. 19 Eq. 588.

<sup>2</sup> Lindley on Companies, 811.

<sup>3</sup> *Weston's case* (L. R. 5 Ch. 614) was a case of transfer by a shareholder into the name of an infant, and in *Richardson's case* the shares were purchased on the market and registered in the name of an infant.

<sup>4</sup> *Brown v. Black*, L. R. 8 Ch. 939. See *Castellan v. Hobson* (L. R. 10 Eq. 47), where the same principle was applied to the case of a purchase of shares in the name of a man of straw, the company having gone into liquidation before the transfer was registered.

<sup>5</sup> Per Kay J. in *In re South London Fish Market*, 39 Ch. D. at p. 331.

<sup>6</sup> See the cases collected in Lindley on Companies, 825-6, and per Lindley L.J. in *Ex parte Hepburn*, 25 Q. B. D. at p. 542.

<sup>7</sup> *King's case*, L. R. 6 Ch. 196. In this case the Court thought that the shares were put in the name of a man of straw for an honest purpose.

<sup>8</sup> 1 Ch. D. 576.

the Rolls thought that describing the foreman as a gentleman residing at his master's works did not constitute a misdescription. It is however difficult to see how the transaction could have been carried through without a misrepresentation of another kind, for in the transfer the purchase-money must have been expressed as paid by the foreman, thus representing the transaction as an ordinary purchase by the foreman from the vendor, which it was not. 'When such a representation is made, the directors may well trust to it, and be excused for asking no questions about it<sup>1</sup>.' If it had been stated in the transfer that the purchase-money was paid by someone other than the foreman, the directors would have been put on enquiry<sup>2</sup>, and their acceptance of the transfer would have bound the company. As it was, the transaction was misrepresented for the purpose of avoiding inquiry, and the real purchaser, who made the misrepresentation, ought, it is submitted, to have been held liable.

B. It was formerly considered that if a person became equitably entitled to the benefit of a lease, he became equitably liable to its obligations<sup>3</sup>; but it may now be considered established that this is not so, although if he takes possession of the land he may be liable at law as an occupier or trespasser<sup>4</sup>, and this rule applies even where the lease is taken in the name of trustees on behalf of a corporation or partnership<sup>5</sup>. The case of *Wright v. Pitt*<sup>6</sup> decided by Malins V.C. appears at first sight to be inconsistent with these authorities, but there the mining company which was equitably entitled to the lease was in the dilemma of being either compelled to perform the terms of the lease or of being treated as a trespasser, and it appears to have elected to submit to the former alternative, so that the decision cannot be taken as impugning the authority of *Walters v. Northern Coal Mining Co.* and *Cox v. Bishop*. The possibility of a person being exposed to liability by reason of his equitable interest in a lease formerly caused some alarm among conveyancers, as it was supposed that on a mortgage by sub-demise it would be dangerous to declare a trust of the nominal reversion for the mortgagee, but this doubt has long been dispelled<sup>7</sup>. In *Mander v. Falcke*<sup>8</sup> a restrictive covenant in an under-lease was

<sup>1</sup> Per Giffard L.J. in *Ex parte Kintrea*, L. R. 5 Ch. p. 100. See also *Payne's case*, L. R. 9 Eq. 233.

<sup>2</sup> See *Masters' case*, L. R. 7 Ch. 292, where the consideration was stated in the transfer to be merely nominal.

<sup>3</sup> The earlier cases are examined in a pamphlet entitled 'An Essay on Equitable Tenancies under Legal Terms of Years,' published anonymously in 1849.

<sup>4</sup> See *Moore v. Greg*, 2 Ph. 717; *Cox v. Bishop*, 8 De G. M. & G. 815.

<sup>5</sup> *Walters v. Northern Coal Mining Co.*, 5 De G. M. & G. 629; *Kay v. Johnson*, 2 H. & M. 118.

<sup>6</sup> L. R. 12 Eq. 408.

<sup>7</sup> *Moore v. Choat*, 8 Sim. 508, and the cases cited in the last three notes. Davidson, Conv. II. ii. 120.

<sup>8</sup> (1891) 2 Ch. 554.



enforced against both the under-lessee and the occupier, *Kekewich J.* holding that the under-lessee was a trustee of the under-lease for the occupier. On an appeal by the latter, the Court of Appeal maintained the injunction against him. 'I do not proceed on the hypothesis that he is cestui que trust of the under-lease, for that is uncertain. I treat him simply as an occupier managing the business<sup>1</sup>.'

C. Trustees or executors who carry on a business for the benefit of their cestuis que trust are of course personally liable for all debts contracted by them, and in ordinary cases the creditors have no other remedy. Where however the testator has specially appropriated part of the trust estate for the purpose of carrying on the business the creditors have a lien on that particular part for payment of their claims. The true basis of the rule seems to be that as the trust estate gets the profits of the business it ought to bear the liabilities<sup>2</sup>, but as it would be practically impossible to administer the estate if the whole of it were subject to the lien, the creditors' right is limited to the fund appropriated to the business<sup>3</sup>.

D. There is an anomalous class of cases in which the performance of a contract has been enforced both against and in favour of a person who, although not a party to the contract, is beneficially interested in it. Some of these cases fall within the special rules relating to marriage settlements<sup>4</sup>. The others appear to be divisible into two sub-classes:—

(a) If a contract is entered into between *A* and *B* in such a way as to show that *B* is merely a trustee for *C*, and *B* refuses to enforce the contract, *C* can sue on it in equity<sup>5</sup>. It would seem that in such a case the question of trusteeship to a large extent depends on whether there was a practical necessity or other good reason for interposing a trustee between *A* and *C*.

(b) If *A* does work which is beneficial to *B* without having a contract with *B* or anyone else, and *B* takes the benefit of the work, *A* can in equity recover remuneration for his services against *B* on what is sometimes called an equitable *quantum meruit*<sup>6</sup>. So if *A* contracts with *B* as trustee for an intended company to sell property to the company, and the company is formed and takes possession of the property, *A* can sue the company in equity for

<sup>1</sup> Per Lindley L.J. at p. 557.

<sup>2</sup> See per Jessel M.R. in *In re Johnson*, 15 Ch. D. at p. 552.

<sup>3</sup> *Ex parte Garland*, 10 Ves. 110; *Strickland v. Symons*, 26 Ch. D. 245; *In re Gorton*, 40 Ch. D. 536, '91, A. C. 190.

<sup>4</sup> Pollock on Contract, 199.

<sup>5</sup> *Gandy v. Gandy*, 30 Ch. D. 57. *Gregory v. Williams* (3 Mer. 582) appears to rest on the same principle: see *Re Empress Engineering Co.*, 16 Ch. D. 125.

<sup>6</sup> *Touche v. Metropolitan &c. Co.*, L. R. 6 Ch. 671; *Re Hereford &c. Co.*, 2 Ch. D. 621; *Re Rotherham Co.*, 25 Ch. D. 103.

the contract price. It is difficult to say whether the principle is the same in all these cases, for some of them are put on the ground of part-performance or adoption giving rise to a new contract<sup>1</sup>, while in others the liability is described as 'an equitable liability depending on equitable grounds<sup>2</sup>,' those grounds apparently being that if a company adopts and derives benefit from the services of a person it is in equity bound to pay for them<sup>3</sup>.

Setting aside for a moment the question of shares in companies, the authorities above referred to do not cover a case which can hardly fail to occur, though it does not so far appear to have come before the courts, namely that of a person entering into a contract or acquiring onerous property in the name of a nominee for the purpose of evading responsibility. Suppose that *A*, being minded to start a hazardous or speculative business, induces *B*, a man of straw, to enter into a contract for the lease of some property at a heavy rent and subject to stringent covenants; *B* agrees in writing<sup>4</sup> to hold the lease as trustee for *A*, and the lessor knows nothing of *A*'s interest in the matter. If the business fails and the rent falls in arrear, and the covenants are broken, has the lessor any remedy against *A*? So long as the matter rests in agreement, there seems no reason why the ordinary rule of principal and agent should not make *A* liable for the obligations undertaken by *B*. And even if the lease is actually granted by deed to *B*, a court of equity ought, it is submitted, to disregard the technical rule of the common law that where an agent is made party to a deed as principal, the real principal cannot sue or be sued on it<sup>5</sup>, and to hold *A* liable on the lease. In *Pickering's Claim*<sup>6</sup> the claimant knew at the time of the execution of the deed that the person who entered into it was a trustee for a company, which was not a party to the deed, and the decision seems to have turned on this point, the claimant being held to have elected to accept the trustee as covenantor in lieu of the cestui que trust. The case supposed is quite distinct from that of a bona fide trust, for where a trustee under an ordinary settlement takes a lease, it could not of course be contended that the lessor can enforce the contract against the beneficiaries. There is no difficulty in drawing the line between the two cases; if there was some good reason for the creation of a trust, the cestui que trust is not liable to be sued on the obligations of his trustee; if on the other hand the so-called trustee is

<sup>1</sup> See *Re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16; *Houard v. Patent Ivory Co.*, 38 Ch. D. 156; *Lavery v. Pursell*, 39 Ch. D. 508.

<sup>2</sup> Per James L.J. in *In re Empress Engineering Co.*, 16 Ch. D. at p. 130.

<sup>3</sup> Per Mellish L.J. in *In re Hereford &c. Co.*, 2 Ch. D. at p. 625.

<sup>4</sup> See *James v. Smith*, (1891) 1 Ch. 384, since affirmed on appeal.

<sup>5</sup> See *U. K. Mutual Ass. v. Neril*, 19 Q. B. D. 110; *Montgomerie v. U. K. Mutual Ass.*, (1891) 1 Q. B. 370.

<sup>6</sup> L. R. 6 Ch. 525.

a mere nominee or dummy, put forward for no other reason but to screen the so-called cestui que trust from responsibility, the relation between them is that of principal and agent, and the principal is liable.

In the case of shares in a company being registered in the name of an agent or nominee, the rule that the register is *prima facie* evidence of membership, and that the company is not bound to notice any trust, makes it more difficult to fix the principal with liability than in the case of ordinary property. The rule exists for the benefit of the company, and if it sometimes produces inconvenience or loss, the natural tendency is to let the company suffer. Hence if a member of a company, in order to multiply votes, subdivides his holding of shares by putting them in the names of nominees, the court will not interfere to prevent it<sup>1</sup>, and the same tendency has led to the establishment (or supposed establishment) of the rule that 'where shares are held by *A*, whether as trustee for *B* or simply as his agent, and *B* has done nothing to render himself a shareholder, according to the company's regulations, and has never acted or been treated as a shareholder, he is not a shareholder, although *A* may be insolvent<sup>2</sup>.' In the case of a bona fide trust, the rule is undeniable, but it 'will not be adhered to where a departure from it is required in order to defeat fraud<sup>3</sup>,' while as regards the case of an agent the authorities really only cover one branch of the rule. Where *A* buys shares in the market in the name of *B*, it is obvious that in the absence of misdescription or other fraud<sup>4</sup>, there is nothing to make *A* liable to the company<sup>5</sup>. He does not contract to take the shares from the company, but from someone else, and if the company desires to protect itself against such transactions it must do so by the usual clause as to transfers of shares on which there is a liability. But where *A* induces *B* to apply for shares in his own name as a mere nominee for *A*, with the intention that *B* may evade liability if the company proves unsuccessful, there is, it is submitted, no difficulty in applying the ordinary rule of principal and agent so as to make *A* liable. An application for shares, followed by allotment, is a contract to take them and to pay what is due in respect of them, and whether *A* applies in his own name,

<sup>1</sup> *Pender v. Lushington*, 6 Ch. D. 70; *Moffatt v. Farquhar*, 7 Ch. D. 591. Where shares are required to be held by the shareholder 'in his own right' (e.g., as a qualification for office, or to entitle a creditor to obtain a charging order), it seems that in some cases, at all events, the question whether he is the real owner or merely a trustee, can be gone into: see *Bainbridge v. Smith*, 41 Ch. D. 462; *Gill v. Continental Co.* L. R. 7 Ex. 332; *Cooper v. Griffin*; '92, 1 Q. B. 740.

<sup>2</sup> *Lindley on Companies*, 46.

<sup>3</sup> *Ibid.* 802.

<sup>4</sup> See *Williams's case*, 1 Ch. D. 576, and the cases referred to *supra*, pp. 222, 223.

<sup>5</sup> *Ex parte Bugg*, 2 Dr. & Sm. 452; *King's case*, L. R. 6 Ch. 196.

or in the name of his agent, he is the person liable on the contract. The fact that the shares are registered in *B's* name cannot affect the question, for the register is merely *prima facie* evidence and can be rectified on discovery of the true facts.

In *Cox's* case<sup>1</sup> a person obtained shares in a cost-book mining company (apparently direct from the company) and put them in the names of nominees 'for the purpose of deluding the public into an exaggerated estimate of the number of shareholders.' It was held both by the Vice-Warden of the Stannaries, and by the Lords Justices, that this wrongful purpose prevented the relationship between the real owner and the nominees from being that of *cestui que trust* and trustee, and the real owner was placed on the list of contributories.

In *Coventry's* case<sup>2</sup> a number of bogus applications for shares were made by the directors of a company in order to make it appear that there was a demand for the shares, but it was arranged between the directors that neither they nor their nominees should be under any liability in respect of their applications. They accordingly allotted 200 shares to the son of one of the directors, and the father shortly afterwards filled up and sent to the company a form of application for 200 shares in the name of his son, who was living abroad and knew nothing about it. The father having died, his executors were placed on the list of contributories. Mr. Justice Kay thought that *Cox's* case applied, and refused to remove their names. He stated the rule as follows: 'If a man applies for shares in the name of a nominee, that is a perfectly good transaction, and the nominee, although only a trustee, and not the nominor, is the shareholder. But if a man applies for shares in a false name, or the name of someone who knows nothing about the application, or the name of an infant, who cannot be made responsible—a dummy name instead of his own—the court treats that man as the real shareholder and the name handed in as a dummy name, and the court does not absolve him from liability.' The Court of Appeal thought that *Cox's* case did not apply, because in the case at bar there was no intention on the part of the father or anyone else to take the shares. It may be objected that if the father had applied for and been allotted the shares in his own name, he could not have escaped liability by pleading a collateral agreement with the other directors that the application should be treated as a nullity: such an agreement would have been wholly inoperative. It is difficult to see why an illegal agreement should become lawful and operative by the mere fact that the application

<sup>1</sup> 4 D. J. & S. 53.

<sup>2</sup> (1891) 1 Ch. 202.

and allotment were made in a dummy name<sup>1</sup>. However, this question does not affect the proposition for which the case may be cited as an authority, namely, that a man may apply for shares in the name of a mere nominee for a dishonest purpose and yet escape liability. The point did not really arise, and therefore the passage in Mr. Justice Kay's judgment to the effect that such a transaction is perfectly good is a mere dictum. It is clear that in the case of a trust properly so-called the cestui que trust is not liable on shares registered in the name of his trustee, and even in cases where there is no trust in the ordinary sense of the word, circumstances may occur to justify an application for shares in the name of a nominee. They did in fact occur in *Bugg's case*<sup>2</sup> and other possible justifications are suggested by *Newry Railway Co. v. Moss*<sup>3</sup>, *King's case*<sup>4</sup>, and *Pugh and Sharman's case*<sup>5</sup>, while the case of the Parsee merchant<sup>6</sup> shows that the existence of an improper motive will not be assumed from the mere fact that a man has applied for shares in the name of a nominee. But where a person applies for shares in the name of a man of straw and conceals his own interest in the matter, it may be fairly assumed, in the absence of some reasonable and proper motive, that his object was to screen himself from liability, and he should be treated as the principal in the transaction. And the same rule may (it is submitted) be applied to any contract for the acquisition of onerous property, such as a lease. To hold otherwise is to mistake form for substance, and to confuse the real distinction between trusteeship and agency. A trust which is created for a fraudulent or improper purpose is no trust, except in form; the real status of the so-called cestui que trust is that of a concealed principal.

CHARLES SWEET.

<sup>1</sup> The judgment of the Court of Appeal does not seem to have proceeded on the ground that the application was made after the allotment.

<sup>2</sup> 2 Dr. & Sm. 452.

<sup>3</sup> 14 Beav. 64.

<sup>4</sup> L. R. 6 Ch. 196.

<sup>5</sup> L. R. 13 Eq. 566.

<sup>6</sup> *London Bombay &c. Bank*, 18 Ch. D. 581.

## EXPENSES AT A PORT OF REFUGE.

## I.

IN the autumn of 1890, at Liverpool, the Conference of the Association for the Reform and Codification of the Law of Nations, revised the York Antwerp Rules of general average, and adopted unanimously the new partial Code of general average which is known as the York Antwerp Rules, 1890.

In these later Rules the provisions with regard to port of refuge expenses were stated with greater fullness; and were widened, so as to carry further the important departure from English law which appeared in the earlier Rules, formulated in 1877. Views prevalent on the Continent, and in the United States, have been again preferred to the doctrines of our law; and as the Conference was largely attended by Englishmen practically concerned with the subject, shipowners, shippers, underwriters, average adjusters, and lawyers, it may be supposed that the conclusions they adopted are nearer to the business ideas of what is right than the law is. And this supposition is confirmed by the fact that the York Antwerp Rules, and now the York Antwerp Rules 1890, have been very widely adopted in contracts of affreightment and insurance.

These facts seem to justify an enquiry into the position of the law of England on this subject, with a view to considering whether it may not be desirable that the law itself should be amended, and if so, in what manner.

Without attempting to consider all the various cases which occur of putting into a port of refuge, I propose to discuss the law, and the practice of English adjusters, with reference to the frequent case of a ship which has put into port *for repairs*, necessary for the safe prosecution of the voyage, where the repairs cannot be effected without first discharging the cargo. And then to contrast these with the rules which prevail abroad on the subject; and also with the York Antwerp Rules 1890, of which the short effect is that the expenses of discharging the cargo to enable such repairs to be done, and the subsequent expenses of storing that cargo and reshipping it, are to be treated as general average.

When a ship deviates to a port of refuge, because it is unsafe to remain at sea, whether on account of some immediate danger,

such as a storm or an enemy's cruiser, or because the ship is so damaged, or her equipment so impaired, that she cannot safely continue on her voyage, in either case the putting in to port is a general average act. It is an act done voluntarily for the common safety under the pressure of a common risk. Hence the extraordinary expenses incurred in getting into the port of refuge, and the necessary harbour dues, are always general average expenses.

Where repairs are needed, and the need has been caused by a general average sacrifice, as by cutting away masts, or rigging, the law as to consequential expenses is sufficiently clear. The Court of Appeal, in *Atwood v. Sellar*<sup>1</sup>, decided that the expenses of warehousing cargo which had been necessarily discharged in order to repair damage of that kind, and also the expenses of reshipping that cargo, and the outward expenses, pilotage, &c., incurred in leaving the port, were all chargeable to general average. The cost of discharging the cargo from the ship was there admitted to be general average, so that no decision on that point was called for; but the reasoning of the Court plainly covered the expenses of that work. The necessity for repairing at a port of refuge is an immediate consequence of cutting away the mast, &c., and the expenses of effecting the repairs, which involve the discharge of cargo, is all general average expenditure.

We pass then to the more difficult group of cases in which the ship puts into port in consequence of having sustained *accidental* damage, which must be repaired before she can safely proceed on her voyage, and which cannot be effected without first discharging all or part of the cargo. In such a case, the cost of the repairs falls wholly upon the shipowner; the accident has befallen his property, and if he decides to repair it he must pay the cost. That is well established<sup>2</sup>. The trouble arises with regard to the expenses of discharging, storing, and reloading the cargo incurred in consequence of doing the repairs.

The law on this subject was much discussed in *Svensen v. Wallace*<sup>3</sup>, and so far as it can be considered as settled, was settled by that case. The Court of Appeal there decided that, in the circumstances we are considering, the expenses of warehousing the discharged cargo, and reloading it are not general average; also that the expenses of pilotage, &c., in putting out to sea again, are not general average. The House of Lords affirmed this judgment with regard to the expenses of reloading the cargo, but left the other points undetermined as being unnecessary to the decision then called for. Lord Blackburn, who gave the leading opinion in the House of

<sup>1</sup> 5 Q. B. D. 286.

<sup>3</sup> *Hallett v. Wigram*, 9 C. B. 580.

<sup>2</sup> 11 Q. B. D. 616; 13 Q. B. D. 69; 10 A. C. 404.

Lords, did not state his reason for deciding that the reloading expenses were not general average<sup>1</sup>. But in the Court of Appeal, the grounds of the judgments of the majority (Lord Esher M.R. and Bowen L.J.) are very clear. It was held that such expenditure is not general average, because it is not incurred to save the ship and cargo from a common peril threatening their physical safety; nor is it expenditure 'caused or rendered necessary' by any sacrifice made for that purpose and under those conditions. 'A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo<sup>2</sup>.' 'The reloading of the cargo and the outward expenses, are expenses of acts done when both ship and cargo are safe from existing danger, and are therefore not within the rule<sup>3</sup>.'

The opposing view, contended for in that case, that an expenditure is general average if made for the benefit of ship and cargo, *to enable the common adventure to be completed*, was distinctly rejected by both judges. Bowen L.J. said<sup>4</sup>: 'Exceptional cases apart it is not sufficient, according to English law, that an expenditure should have been made to benefit both cargo-owner and shipowner. The idea of a common commercial adventure as distinguished from the criterion of common safety from the sea, would lead to the inclusion in general average of, at all events, temporary repairs of the ship caused by particular average loss, and would enable the shipowner to complete his part of the contract of affreightment by means of a money contribution levied perforce upon the cargo-owner.'

Let us now compare the practice of adjusters on these points with the law there laid down:—

(1) With regard to the cost of unloading, there has been a remarkable steadiness of practice among adjusters; it has been the uniform rule to charge it to general average, whether the repairs to be done have been necessitated by accident or by sacrifice. And thus it has come about that the question has not been raised in the Courts. Even in *Svendsen v. Wallace* it was not disputed.

But it is, I believe, quite impossible to reconcile this practice with the leading principle definitely adopted in *Svendsen v. Wallace*. Where the condition of the ship after arrival in the port of refuge is such that both ship and cargo are in danger, say of sinking, until the cargo is discharged, the operation of unloading is no doubt done for the common safety 'in the hour of peril,' or, perhaps more accurately, under pressure of a common danger; and is therefore itself a general average act. But the cases which I put for consideration are those in which ship and cargo are safe within the

<sup>1</sup> 10 A. C. p. 417.

<sup>2</sup> Per Lord Esher, 13 Q. B. D. p. 78.

<sup>3</sup> Per Bowen L.J. 13 Q. B. D. p. 84.

<sup>4</sup> 13 Q. B. D. at p. 86.



port of refuge, but in which the ship cannot be repaired, and the voyage consequently cannot be proceeded with, unless the cargo, or part of it, be discharged. In such a case it is for the shipowner to determine whether he will, or will not repair. Generally he is bound to repair, unless the damage sustained has been caused by perils excepted in the contract of carriage, and is of such a character that it prevents, in a business sense, the completion of the voyage<sup>1</sup>. But, whether bound or not, if the owner elects to repair he must discharge the cargo for that purpose; the operation is an incident of the repairs; it is not a general average act in the sense above defined, for it is not done under the pressure of danger or for the safety of the cargo; and it is not an operation 'caused or rendered necessary'<sup>2</sup> by the act of putting into the port for safety. On the theory of the law, then, it seems plain that the cost of discharging should properly fall, with the cost of repairs, upon the shipowner.

*Hallett v. Wigram* (9 C. B. 580) was to that effect. A shipper sued for the value of goods which had been sold by the master at a port of refuge. The shipowner pleaded that the goods were sold to defray expenses of unloading at the port and repairing damage caused by a storm, to enable the ship to prosecute her voyage, and to prevent her and her cargo from being wholly lost, and for the common benefit of all interested. The plea further alleged that the expenses so incurred in unloading and repairing had exceeded the value of the ship, and contended that the shipowners were only liable to contribute to the amount as general average. On demurrer the Court held that this was not a good defence; no case for general average contribution being disclosed. The damage being accidental the cost of the repairs fell on the shipowner. No distinction was suggested between the expenses of unloading and the expenses of repairs.

In *Svendsen v. Wallace* the question did not arise, as the adjusters on both sides agreed in treating the expenses of unloading as general average. But the view of Bowen L.J. may be gathered from the following passage<sup>3</sup>:—'In practice, it has in recent times become common to carry these unloading expenses to general average, both where the repairs of the vessel have been rendered necessary by a general average act, and where they are rendered necessary by a particular average loss. Nor is it necessary to discuss a practice which may have become inveterate and which is found adequate. Still, if strict theory were to be in each case relied upon, such unloading ought, as it seems to me, to be dealt with specifically in every instance by applying to it the two tests I have named. If

<sup>1</sup> See per Collins J. *Assicurazioni Generali v. Bessie Morris Co.* (1892) 1 Q. B. 571.

<sup>2</sup> Per Bowen L.J. 13 Q. B. D. p. 85.

<sup>3</sup> 13 Q. B. D. p. 87.

necessary for the common preservation of both ship and cargo, the unloading will be in itself a general average sacrifice; see *The Copenhagen*<sup>1</sup>. If not so necessary, it will not in itself amount to a general average sacrifice at all, but it may nevertheless be properly included as a subject-matter of contribution whenever the expenditure is directly caused by some antecedent act of general sacrifice.'

It is true that the Master of the Rolls, in the same case, endeavoured to reconcile this practice of treating the expenses of discharge as general average with the law, by suggesting that the general average act of putting into the port of refuge was a 'going in to repair'; and that the unloading was a part of that act 'done in order to put the ship into such a position that she can be repaired.' But, as already said, an act to be a general average sacrifice must be done for the common safety. That is the doctrine insisted on throughout this and other cases. And, on the hypothesis, after arrival in the port nothing more was necessary for the purpose of securing physical safety. If, then, the putting in was *for repair*, it was still only a general average sacrifice so far as it was a putting in *for safety*. Moreover, if the whole act of *going in to repair* is to be regarded as a general average act, it seems almost impossible to say that the other incidental expenses of repair, such as storage of cargo, are not also general average, as being parts of that act, or consequences of it. Mr. Lowndes, in the last edition of his work on general average, accepted the suggestion of the Master of the Rolls as the true explanation of the adjusters' practice. But he at once (p. 218) proceeded to deduce from it that the expenses of warehousing and reloading ought also to be general average.

We have then, as it seems to me, in this uniform practice of charging the expenses of unloading to general average, a plain instance of conflict between the business view and the theory of the law.

(2) I proceed to the next head of expenditure, the warehousing charges on cargo discharged to enable the repairs to be done. The practice of adjusters is to charge these expenses to the owners of the cargo. And that practice has been judicially approved. Bowen L.J.<sup>2</sup> in *Svensden v. Wallace* said that 'warehousing the cargo is a charge that ought to be borne by the cargo which benefits exclusively by it.' There may at first sight be some difficulty in seeing why these charges for protecting the cargo should not be borne by the shipowner, on the ground that they save him from responsibility for the damage which the cargo might otherwise sustain. It might be argued that the shipowner has by

<sup>1</sup> 1 Chris. Rob. 289.

<sup>2</sup> 13 Q. B. D. p. 89.

his contract undertaken to deliver the goods at their destination in good order, unless he is excused by the express or implied exceptions. And that the loss or damage which might happen to the goods after landing (say by theft, or exposure to rain), would not be a loss *proximately* by the perils of the sea which had rendered the unloading necessary. Also that it would not be covered by other exceptions in the contract, if means of protecting the goods had been available. The explanation, however, seems to be that the shipowner has been *prevented* by the perils of the sea from completing the voyage, unless he first discharges the cargo; and as the contract contemplates that the voyage shall be completed, and indeed requires the shipowner to complete it, it follows that, having regard to that contract, the discharge is a necessary consequence of the accident by perils of the sea<sup>1</sup>.

That being so, the shipowner is not liable under the contract for the consequences to the cargo of the discharge; and though bound to do his best to mitigate the effects of the misfortune which has thus befallen the cargo, he only has to do so on behalf of the owner of the cargo, and at his own cost<sup>2</sup>. The rule as to the expenses of storage adopted in practice, therefore, seems to be consistent with the law.

But is that rule a fair rule, as between the owners of different parts of the cargo? It frequently happens that only part of the ship's cargo need be discharged to enable the repairs to be done. In such a case the risks and expenses consequent upon the discharge fall wholly upon those goods; while the benefit of continuing the voyage, which has been thus procured, is shared by the owners of the other parts of the cargo, without risk or expense. Moreover, it may be a matter of choice with the master as to which goods he will discharge; he may have it in his power to put the risk and expense upon one part of the cargo, or upon another part, arbitrarily.

The case is in these respects very analogous to that of a jettison, or to an exposure of part of the cargo on the shore, or in lighters. A benefit to the whole is procured at the expense of a part. Do not the grounds of justice and policy which in those cases require that all shall be put upon a footing of equality, apply also to the case we are considering? It would seem that these expenses should either be treated as general average, or should be at least contributed to by *all the cargo-owners*. And as the shipowner is also interested in the safe arrival of the cargo, in respect of his freight, there would

<sup>1</sup> See *Montoya v. London A. Co.* 20 L. J. Ex. 254, cf. *Pink v. Fleming*, 25 Q. B. D. 396.

<sup>2</sup> See *Notara v. Henderson*, L. R. 7 Q. B. 225, p. 235; *Cargo Et Argos* L. R. 5 p. c. 134; *Hingston v. Wend*, 1 Q. B. D. 367.

be no hardship in making him contribute also, at any rate in respect of the freight.

But though considerations of policy and justice lead us to that conclusion, the legal theory does not. Here, as before, the fact which prevents the warehousing expenses being treated as general average is the absence of any common danger. The expense is not incurred for the *common safety*, it can at most only be said to be in furtherance of the common voyage. And that is not, with us, a sufficient ground.

(3) Now as to the third group of expenses, those of reloading the cargo after the ship has been repaired. These are in practice charged to *freight*. The view taken being that they are incurred for the purpose of earning the freight by completing the voyage. That they cannot be charged to general average was finally determined by the House of Lords in *Svensen v. Wallace*; although the view was taken that the discharge of the cargo had there been necessary for its safety. The Court of Appeal had already come to the same conclusion on the view that the unloading was merely for repairs.

The question who ought to bear the reshipping expenses did not there arise, except in that limited manner, that is to say, whether or not they were general average; but Bowen L.J. expressed the opinion that the 'charges of reloading ought in principle to fall upon the freight, or else upon the freight and the ship together, if the two interests are severed.'

These expenses, as the same Judge pointed out, are 'a loss caused by the captain's decision to repair his ship, and to unload and reload the cargo for that purpose' (13 Q.B.D. p. 89). They are expenses incident to the repairs which the shipowner, as carrier, was bound to undertake; and which he has undertaken in order to perform his contract of carriage. Having repaired the ship, he is by his contract bound to put the goods on board and carry them forward. Where, indeed, as in *Atwood v. Sellar*, the repairs have been necessitated by a general average sacrifice, so that the cost of repairing at the port of refuge is a consequence of that act, these incidental expenses are chargeable to general average. But where the cost of repairing falls on the shipowner only, so too should the expenses naturally incident to that. The only alternative, that they should be treated as general average, has been negatived.

Whether the shipowner can claim indemnity against these charges from his underwriters on freight is another question; a question which cannot properly be determined until after the enquiry upon whom, *independently of insurance*, the expenses ought to fall.

But the practice of adjusters has been to debit the charges to freight directly; not to the shipowner first, and through him to his underwriters on freight. And thus it has come about that, where some of the freight has been paid *in advance*, part of these charges is debited to the cargo-owners (or their underwriters), as being interested in that prepaid freight. A result which will be seen to be wrong if the primary liability of the shipowner be recognised. Freight is at the present day very commonly paid in advance, either wholly or in part, so that this treatment of the matter is of serious importance. That the practice is erroneous is clear, if the above statement of the law is right.

This point has not come very distinctly before the Courts; but in *Svendsen v. Wallace* the judgment of the House of Lords proceeded upon the assumption that the whole of the reloading expenses would be borne by the shipowner, although part of the freight had there been paid in advance. Lord Blackburn, though fully aware of that fact, said, 'If the £450 which is the cost of re-shipping is properly charged to freight the defendants (the merchants) are not liable to pay any portion of it.'

The difficulty which has apparently given rise to the prevailing practice is that the shipowner who has received part of the freight in advance, and therefore has insured with respect to part of the freight only, viz., that which remains at risk, is not in a position to charge the underwriters on that remaining freight with the whole of the reloading and outward expenses. Those underwriters may well claim that these extraordinary expenses have been partly incurred by the shipowner in order to perform the service for which he received the *prepaid* freight; and on that he has paid no insurance premium. But this is no sufficient reason for putting that part of the expenses upon the cargo-owner. He has not by paying the freight in advance undertaken to bear any part of the cost of bringing the goods to their destination. And the accident which gave rise to the expenses has not altered his right to have the voyage completed.

If, however, the view were taken (as I would think erroneously) that the accident *has* altered the rights of shippers, then though it is no doubt true that a shipper who has paid freight in advance has, to that extent, a greater interest in the completion of the voyage than another shipper of similar goods who has not paid in advance (for he is entitled to have them at the destination upon making a *pro tanto* smaller payment), still his interest is greater only to that extent. The justice of the case therefore would require that *all* the cargo-owners should contribute; the difference in interest being allowed for by adding the freight advanced upon

any goods to the value of those goods. On this view the contribution by cargo should not depend upon whether any freight has been advanced or not. If the cargo-owners are not entitled to have their goods carried on, they are all interested, as well as the shipowner, in making some sacrifice in order to get the voyage completed with the goods on board. In short we are led, *on this view*, to the conclusion that the reloading and outward expenses should always be borne by a contribution among the cargo-owners in respect of their goods, and the shipowner in respect of his freight still at risk.

Summing up then, with regard to these three groups of expenses, we find :—(1) That the adjusters' practice of making the expenses of unloading general average is not justified by the law.

(2) That their practice of charging storage expenses to the owners of the cargo discharged agrees with the law ; but that there are strong reasons for considering the law and the practice to be unjust, and for requiring contribution to those expenses by all the cargo-owners, if not also by the shipowner.

(3) That the practice of charging the reloading expenses to freight agrees with the law so far as they are thus charged to the shipowner. But that the practice of making those who have paid advanced freight contribute, is not justified by the law ; and can only be justified by a view which requires that all the cargo-owners should contribute.

These results seem to me very remarkable. As to (1) and (3) English law and English practice are in conflict ; while the practice as to (1) agrees with, and as to (3) points towards the foreign rules, which I shall presently discuss. As to (2) the law and the practice agree, but are both unjust, and seem to require alteration in the direction of the foreign view.

## II.

If we now turn to the rules which obtain on this subject abroad it will be found that they are practically uniform, and that they everywhere differ both from English law and English practice. Lowndes, in his book on general average (4th ed. 1888), compared and tabulated the rules in seventeen European and American States ; and his table shows that in all those States, with the doubtful exceptions of Spain, Peru, and Chili, substantially one view has been adopted. The expenses of putting into and coming out of a necessary port of refuge, including the cost of unloading, warehousing, and reloading the cargo, are all treated as general average. And, except in France, so also are the wages and keep

of the crew during the stay at the port. No distinctions are made between cases in which the putting into port, or the need of repairs, has been necessitated by accident and those in which it has been the result of a sacrifice. Some minor distinctions occur; e.g. in the law of Norway, putting in owing to 'pursuit of an enemy, contrary wind, ice, falling short of provisions, or other similar cause,' is treated differently from a putting in owing to damage which renders the ship unseaworthy; and in the Dutch Code, damage done to the cargo by discharging is only treated as general average when the discharge takes place in a manner unusual at the port. But apart from such smaller points, there is in practice a broad agreement in the rule I have stated.

I say *in practice*, because when one examines the Codes in which in most countries the law is expressed they do not seem always to bear out the rules actually adopted. Despite the formal expression of the law in the Codes, practice often departs from the law abroad, as much, or more than it does in England. For example, the French Code (s. 400) includes in general average, 'damage voluntarily sustained and expenses incurred after express deliberation for the common good and safety of the ship and cargo.' But it is expressly declared by s. 403 (3), that 'expenses resulting from the putting into a port of refuge if occasioned by the accidental loss of such articles' (cables, anchors, sails, masts or cordage) 'or by the need of victualling or to repair a leak' are to belong to particular average. Notwithstanding this, Lowndes (p. 377) found that the practice in France is to charge all the expenses consequent on putting into a port of refuge to general average, as already described, when the putting in has been to repair damage which has rendered the ship *unnavigable*. And I gather that this practice has sometimes, if not always, had the support of the French Courts.

Similarly, in Spain the expenses of putting into a port are, it is said (Lowndes, p. 561), treated as general average, when the putting in is necessitated by general average damage, though by s. 821 of the last Code (1805) it is provided that 'the expenses of the putting into a port of refuge are always to the shipowner's or lessor's account:' while s. 822 puts the cost of discharging for repairs on the shipowner; and s. 823 makes him responsible for the custody and care of the discharged cargo, except as against *fuerza mayor*.

And in Portugal the practice is apparently even more contrary to the Code; which contains a provision (s. 1612), similar to that of the Spanish Code, charging the expenses of entering a port of refuge to the owner (Lowndes, 3rd ed. p. 96).

The discrepancy between theoretical law and practice appears to

be of old standing in France. Emerigon, writing in 1783, treated the subject with his usual conciseness and clearness. Summing up the authorities, from the Roman law down to the Ordinance of Louis XIV, of 1681, he said<sup>1</sup>, 'It results from these texts, (1) That expense incurred and damage suffered are not general average, except in the case where they have been incurred voluntarily for the common safety. It is necessary that the act of man should have concurred with the accident; there must have been a forced will. (2) It must have been a question of shunning an imminent danger. A panic would not excuse a captain in making a jettison without being forced to it by a real danger. Still prudence does not allow him to wait the last extremity.' An exact statement of the doctrine which has led to our English position.

Later on<sup>2</sup> he treats of expenses at a port of refuge. After showing that the Roman law and other authorities did not allow contributions to the cost of repairs, he cites the following passage from Ricard (négoce d'Amsterdam): 'When a vessel is forced by tempest to enter a port to repair damages, if she cannot continue her voyage without risk of being entirely lost, the wages and subsistence of the crew from the day it has been resolved to seek a port for repairs to that of her departure therefrom are carried into general average, together with all the expenses of discharging and reloading, anchorage and pilot dues, and all other charges and expenses caused by this necessity.'

To this Emerigon adds, 'Such is pretty nearly the jurisprudence of our Admiralty. . . . But the expenses and cost of the repairs, the price of the masts, sails and other rigging it has been necessary to purchase are not so admitted. Still, if there has been an excessive value in all these objects either from a scarcity of workmen or from dearness of timber, rigging and other materials, this surplus of price would enter into general average.'

He goes on, '*It is true the law above cited is contrary to our jurisprudence.* But if the vessel injured by tempest were not repaired in the port of repose she would remain unnavigable; this would bring the most serious prejudice to the cargo. It is then a question of expense incurred for the common good and safety.'

This persistence of practice, in spite of inconsistent theory, and in spite of contrary enactments, is very significant to show how strong has been the opinions that justice, or convenience, require a treatment of the matter different from that required by the legal view. Moreover we not only have examples of this conflict between Code and Practice, but in some of the modern Codes we find a

<sup>1</sup> Chap. XII. 39. 6.

<sup>2</sup> Chap. XII. 41. 6.



corresponding conflict within the Code itself. The practical view seems to have been grafted upon the legal theory, with perhaps some sacrifice of logic.

Thus the German Code (adopted in 1862) defines (Art. 702) general average as, 'all damage intentionally done to ship or cargo, or both, by the master or by his orders, *for the purpose of rescuing both from a common danger*, together with any further damage caused by such measures, and also expenses incurred for the same purpose.'

Then by Art. 708 (4) it provides that 'When the ship, in order to avoid a common danger, threatening ship and cargo in case of continuing the voyage, is run into a harbour of refuge, particularly where the running in is for the necessary repairing of a damage which the ship has suffered during the voyage,' the cost of discharging, warehousing, and reloading shall belong to general average, if the cargo has to be discharged 'on account of the motive which led to the putting into port.'

That position, if I rightly understand it, is exactly the one which our Courts held to be untenable, in *Svensden v. Wallace*<sup>1</sup>. For it adopts the 'common danger' principle as essential, and yet makes the expenses at a port for repairs general average, though incurred after ship and cargo are in safety.

In the United States also the law appears to differ from our law in the same way, though professedly based on the same principle of 'common safety'<sup>2</sup>.

In England we have parted company from other maritime communities; but our Text Books and Law Reports show that what we may call the Continental view has only been dissented from by our judges in quite modern times, and after very remarkable fluctuations of opinion. In *Da Costa v. Newnham*<sup>3</sup> (A. D. 1788), Buller J. cited a passage from Beawes, showing the law in foreign countries with regard to expenses at a port for repairs, in the sense already stated, and added, 'I do not know that this point has ever been settled in England.'

In *The Copenhagen*<sup>4</sup> (A. D. 1799), and *The Gratitude*<sup>5</sup> (A. D. 1801), Lord Stowell's judgments seem to show that he was of opinion that expenses incurred for the common benefit at a port of refuge should be treated as general average.

In 1802 the first edition of Abbott on Shipping was published; and the view there expressed was that, where the cost of repairs at a port of refuge falls on the shipowners, they ought also to bear all the expenses accessory to those repairs; it being their duty, so far

<sup>1</sup> 13 Q. B. D. 69; 10 A. C. 404.

<sup>2</sup> Phillips, *Insur. cf. ss.* 1270, 1320, 1326; Lowndes, pp. 606, 620, citing Gourlie.

<sup>3</sup> L. T. R. 407.

<sup>4</sup> 1 C. Rob. 289, p. 294.

<sup>5</sup> 3 C. Rob. 240, p. 264.

as in them lies, to keep the ship in good condition during the voyage<sup>1</sup>.

On the other hand Stevens, who first published his book on Average in 1813, laid it down (p. 25) that 'all extra charges incurred for the general good on putting into a foreign port in distress<sup>1</sup>, ought by the common law to be made good by a general contribution.' He cited *Da Costa v. Newnham*, which is, however, no authority for the point, and referred to the foreign laws.

'But he further spoke of a 'practice of Lloyds,' and of 'the customary decision of the Registrar and merchants in such cases, that all the charges incurred expressly for the general benefit are to be placed to the general average; those incurred for the preservation of the goods to the cargo; and the outward charges whereby the ship is again set forward on her voyage, to the freight<sup>2</sup>.'

We here evidently have traces of the practice which has ever since prevailed in England. And in Benecke's Principles of Indemnity, published in London in 1824, the practice as it at present exists is described and spoken of as 'so far sanctioned by custom that an attempt to correct it would meet with great opposition' (p. 198). Benecke did not, however, regard the practice as correct.

In January, 1815, the matter came before the Queen's Bench in the case of *Plummer v. Wildman*<sup>3</sup>, and Lord Ellenborough and Le Blanc and Bayley JJ. decided that the expenses of putting in to a port of refuge, and of landing and storing the goods during repairs, and of reloading them afterwards, were all chargeable to general average. And not only these incidental expenses, but also the cost of the repairs was allowed in general average; the only limitation being that any benefit resulting to the ship from the repairs, beyond the prosecution of the voyage, was to be deducted.

The damage there had been caused by a collision, by which the ship's 'false stern and knees were broken, and the master was in consequence obliged to cut away part of the rigging of her bowsprit, and to return to Kingston (the port of departure) to repair the damage sustained by the accident and the cutting away.'

The decision went to the fullest extent of the continental view. And it was based on the ground that, as all were equally benefited by the removal of the ship's incapacity to continue her voyage, it was reasonable that all should contribute towards the expenses of it.

But, within four months, the authority of the case was qualified

<sup>1</sup> See the passage set out in Shée's note, Abbott, Eleventh Edition, p. 533.

<sup>2</sup> See also *The Copenhagen* (1 C. Rob. 289) where it was referred to the Registrar and merchants to enquire as to the existence of a rule of practice.

<sup>3</sup> 3 M. & S. 482.

by a reference made to it in *Power v. Whitmore*<sup>1</sup>, which came before the same three judges in May 1815. Lord Ellenborough is reported to have spoken of it as a case in which 'the master was compelled to cut away his rigging in order to preserve the ship and afterwards to put into port to repair that which he sacrificed.' And this has in recent years been taken as the explanation of the decision.

It is, however, impossible to read the judgments in *Plummer v. Wildman*<sup>2</sup> as depending upon the fact of an original voluntary sacrifice. The language, especially of Lord Ellenborough, is too clear. And the decision was that *all* the expenses necessary to enable the ship to prosecute the voyage, including the accidental repairs, were to be general average. And though the case is now of no authority, it was evidently treated as an authority by Lord Tenterden, who had been counsel in *Power v. Whitmore*, when the fifth edition of his book was brought out in 1837, under the editorship of his son. The passage in the earlier editions to which I have referred above was then omitted, and a new passage was inserted (p. 347) giving the effect of the decision in *Plummer v. Wildman*, so far as it related to the expenses of unloading, warehousing, and reshipping, without any suggestion that the ruling had been qualified. Lord Tenterden was then alive, and it is quite improbable that these changes were made without his sanction.

Again, a few years later (1848), Arnould published his work on Insurance, and cited<sup>3</sup> *Plummer v. Wildman* as an authority for the proposition which he then laid down, generally, that 'when in order to repair the ship it becomes absolutely necessary to discharge the cargo, all the expenses of unloading, warehousing, and reloading it come into general average, because incurred for the joint benefit both of the ship and of the cargo: of the ship, that she may be repaired, and of the cargo that it may be preserved.'

To this we may add that *Plummer v. Wildman* has been treated as an authority in the United States, where the law seems to be in accord with that decision<sup>4</sup>.

In 1855, again, *Hall v. Janson*<sup>5</sup> is another decision that 'the expenses necessarily incurred in unloading and reloading for the purpose of repairing the ship that she may be made capable of proceeding on the voyage' are general average; being 'deliberately done for the joint benefit of those who are interested in the ship and cargo and the freight.'

But meanwhile it had been definitely made clear in *Hallett v. Wigram*<sup>6</sup> (A. D. 1850), that the actual cost of accidental repairs must

<sup>1</sup> 4 M. & S. 141.

<sup>2</sup> 3 M. & S. 482.

<sup>3</sup> Second Edition, 921, § 335.

<sup>4</sup> Phill. Insur. ss. 1300, 1320, 3 Kent 188.

<sup>5</sup> 24 L. J. Q. B. 97.

<sup>6</sup> 19 L. J. C. P. 281.

be borne by the shipowner, although the repairs may have been done for the common benefit at a cost exceeding the repaired value of the ship. And in that and the later cases it has been steadily insisted on that a sacrifice or expense to be general average, must have been incurred under circumstances of impending peril.

Finally, as we have already seen, this essential condition was restated with great distinctness in *Svendsen v. Wallace*; and the idea of a 'common commercial adventure as distinguished from the criterion of common safety from the sea' was expressly said to be inadmissible.

### III.

It is difficult to resist the conclusion that the expenditures we have been considering cannot logically be treated as general average, *if imminent peril*, threatening the physical existence of ship and cargo, *is to be regarded as an essential condition of a general average sacrifice or expenditure*. But we find that while that theoretical view has been repeatedly asserted, here and elsewhere, practical men nearly everywhere, indeed we may say everywhere, have agreed in ignoring it in relation to some or all of those expenditures.

And the tendency of this practical opinion is rather in the direction away from the legal theory than towards it. The York Antwerp Rules of 1877 (VII), brought the warehousing and reloading expenses at a port of refuge within general average; and (VIII) also the wages and maintenance of the crew during the stay at the port. The corresponding York Antwerp Rules of 1890 go further. Rule X allows as general average the cost of discharging, storing, and reloading, whenever cargo is discharged for repairs which have accidentally become necessary, although the repairs be done, not at a port of refuge, but at one of the ordinary ports of loading or call on the voyage. It is enough that the damage to be repaired shall have been caused by sacrifice or accident during the voyage, so that the repairs shall have been necessary for the safe prosecution of the voyage. And Rule XI makes the wages and maintenance of the crew general average during any detention for such repairs. These rules are unmistakably based on the view that an expenditure *for the sake of accomplishing the voyage*, necessitated by an accident, should be treated as general average.

The idea seems to be that, while the actual cost of repairing accidental damage which has befallen one of the interests concerned should be borne by that interest alone, the incidental expenses necessary to prevent the frustration of the voyage by that accident should be borne by all.

The conclusion seems forced upon us that the legal theory of general average requires expansion. A broader statement of the principle is wanted, extending it to cover extraordinary expenditures which may be incurred to prevent the frustration of the voyage by accidental perils. Accidental damage and losses must lie where they fall ; but if we are to be guided by the views of business men, expenses which have become necessary, owing to accident, to enable the safe prosecution of the voyage, ought to be made good by general average contribution, if the prosecution of the voyage is in the interest of both ship and cargo.

And the only satisfactory way of altering the rules on this subject is by legislation. The method of the York Antwerp Rules has been by contract. They have no effect except where they have been expressly adopted in contracts of carriage, and of insurance. Their effect in that way is very large, but it is only partial ; and the wider their operation, the more does it become unsatisfactory that cases in which no contract has been made should be dealt with under rules which are condemned by the best practical opinions.

Moreover the method of contract is apt to fail. The contracts may not agree. Some bills of lading may adopt the York Antwerp Rules while others do not. There may be a charter party relating to the voyage which adopts the new rules, while bills of lading for goods shipped under the charter may fail to do so. Or, again, the contracts of insurance may not agree with the contracts of carriage. And even where a particular set of rules is adopted in all the bills of lading, still questions of general average affect the shippers among themselves, and their bills of lading are contracts with the ship-owner, not with other shippers. The law of general average governs the right of persons, co-adventurers, who are not all under contractual relations with one another ; and the rules of that law must apply where they have not been modified by contract.

Other considerations also point to the desirability of legislation on the subject of general average. More especially the ill-defined state of the law on many points. The cases decided in the Courts have been too few to enable the legal principles to be worked out in that detail which business requires. The matters discussed in this paper afford illustrations, which might easily be added to, of the want of certainty which exists. An uncertainty which sheds no lustre on our jurisprudence, and is unworthy of our position as leaders in maritime commerce.

T. G. CARVER.

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LE MARIAGE EN DROIT CANONIQUE<sup>1</sup>.

**P**ROFESSOR ESMEIN has produced a most valuable and most readable work. To the industry of an Englishman or a German he has added the lucidity and logical method of a Frenchman; and the result is a book which the reviewer has read with pleasure from cover to cover; and which may be regarded as a nearly complete treatise on the Canon law as to the making and unmaking of marriages, as such Canon law has been usually received in Continental Western Europe, both before and since the Council of Trent. He has not unnaturally failed to handle the one or two peculiarities which distinguish the Canon law as received in England and Ireland from the ordinary Canon law of the West, and he very fairly states that such illustrations as he supplies from the law of the Eastern Church are not matters of independent research, but are taken from the work of Zhisman.

Starting from the early relations of the Christian Church, first with the Roman Empire and secondly with its Teutonic invaders, M. Esmein traces the growth of the Church's control, first by counsel and warning, secondly by disciplinary action over penitents, and thirdly by the external jurisdiction which Christian Kings conceded to its Courts, and then the gradual waning of the same control as the lay Courts reestablished their jurisdiction, not however over marriage with the old heathen ideas, but over an union and according to principles and methods which had been entirely changed by the spirit of Christianity.

As to the period of growth and the stationary period M. Esmein is full, precise and, as far as the reviewer can dare to judge, most learned and accurate. The later periods are perhaps less interesting and are less fully treated. In the first chapter the third period which is defined as that of the secularisation of marriage (vol. I. pp. 31-55) is summarily treated, correctly in all probability as far as France and many of the countries of Continental Europe are concerned, somewhat incorrectly as to England at p. 49, and with a total omission of the law of marriage as received in the United States and its very interesting condition in the Spanish countries of America at the present day.

The second chapter traces the development of the Christian

<sup>1</sup> *Le Mariage en Droit Canonique*, par A. Esmein. Paris: 1891. 2 vols. 8vo. 431 and 391 pp.

theory of marriage upon its double line of growth, matrimony being a sacrament with all the incidents of a sacrament and yet at the same time being a contract and one of the class of contracts made by mere consent, with all the consequences which the Roman law attached to consensual contracts.

The second part of the book takes up the developed theory as it had taken shape at the end of the twelfth century and as it remained substantially unaltered till the promulgation of the decrees of the Council of Trent in the sixteenth century. Chapter i. of the second title of the second part (the divisions are rather cumbrous) deals with the impediments to marriage, divided in the usual way between the absolute impediments (*impedimenta dirimentia*) and those which only oppose an obstacle to the correct solemnization of marriage (*impedimenta impeditiva*); the first as the most important taking the chief place.

The absolute impediments are subdivided: section 1 deals with those of general incapacity (pp. 216-220); and first among them with that rule forbidding marriages between Christian and non-Christian, the rule as to *cultus disparitas*, which though a matter of ecclesiastical custom only (see vol. II pp. 267, 268), has taken firm hold upon the Church; and is in practice most important at the present day.

The distinction between the marriage of the heathen which is a true marriage, *verum ac legitimum*, but which is not *ratum* and may still be dissolved for certain causes, as for instance, by the conversion of one of the spouses and the refusal of the other to live on in union upon Christian terms, is incidentally elaborated at pp. 220 to 232. The question of polygamous converts to Christianity arises in this connection, and is discussed.

The other impediments of 'general incapacity,' age, impotence, and the already contracted engagements of a previous marriage, religious vows and holy orders are fully and most analytically treated of at pp. 232 to 301.

The very gradual growth of the legislation which prohibited marriage to the clergy and the continuing recognition by the Western Church of the lawfulness of the Eastern rule in this matter are clearly shown.

Section 2 (pp. 302-335) deals with those defects which the author calls defects of consent (*vices du consentement*): that is, actual absence of consent, force, and error as to the identity of the person married, or as to his or her condition, this error being limited to the case where a free man or woman espouses in ignorance a slave. Actual defect of consent seems a simple matter; but the Canonists drew a distinction between external and internal consent which (unless

report is slanderous) is used sometimes at the present day in the Roman Church as an instrument of dissolving ill-assorted marriages without recognising the power of divorce (see however vol. II. p. 209).

Section 3 (pp. 335-343) deals with all the impediments founded on a previous relation between the parties: the most difficult to understand is that of *publica honestas*, which makes an impediment of the previous betrothal of one of the spouses to the kindred (within the prohibited degrees) of the other. Then comes kinship (*cognatio*) which besides blood relationship includes kindred by adoption, i. e. the strict adoption of the Roman law, and spiritual kindred, where the parties are connected through sponsorship at the font (*god-sib*). This most curiously mystical prohibition, though its exuberances were retrenched by the Council of Trent (vol. II. p. 261), still exists in the Canon law.

Affinity by marriage or by sexual relation outside the pale of marriage constitutes the next prohibition. In this connection we may lament that dispensations, though treated of in Part III. Ch. vii. (vol. II. pp. 314-368), are less fully discussed, both historically and as matter of everyday practice, than the other subjects of the work.

Lastly comes a prohibition of the adulterer marrying the woman he has corrupted, if in order to make marriage possible he has killed, or, according to one view, has plotted the killing of the husband (*criminis enormitas*).

The second chapter of this second part is given to the procedure by which the validity or invalidity of a marriage is determined. What is most interesting in this procedure is the difficulty in which the canonists were placed by their ignorance or refusal of *viva voce* evidence and cross-examination. No doubt the latter art has largely improved in quite recent periods: and we can see how even in recent times and in this country the increase of cross-examination coupled with the admission of the parties themselves to the witness box has led to the substitution of evidence for presumption.

With the Canon law (unless there was documentary evidence) it was all presumption or common fame. What the Scotch call 'habit and repute' and the French *possession d'état* was the only matter on which direct parol evidence seems to have been admitted.

In the second volume we come to the effects of marriage both as to the rights of each spouse in the person of the other, and as to the legitimacy of children. Here we have brought out the well-known refinements of the Canon law by which the children of a 'putative marriage,' that is a marriage solemnized with apparent form, may be legitimate, though the marriage itself be void. In the



first chapter it is interesting in view of the *Jackson* case to note that the Canon law held that a husband might for good cause chastise his wife (vol. II. p. 7).

Chapter ii. in this volume deals with Divorce, a subject on which there is not much that is new to be said. It is evident that the Western Church early set itself to prohibit Divorce, and that it encountered great opposition and had in some cases to temper its decrees when dealing with the half Christianized Franks and other Teutonic tribes.

Part III. gives us in Chapters i. and ii. the discussions which led to the reforms made by the Council of Trent, and in Chapter iii. the reforms made by that Council—the great change being that by which clandestine marriages were rendered impossible. As the author says (vol. II. p. 154) marriage from being a consensual contract became a solemn contract—that is, one requiring forms as part of its essence.

In theory this superaddition of necessary form is explained as being a restriction upon the personal capacity of the contracting parties. As one may not marry under the age of puberty, or if madness has deprived him or her of reason, so a subject of the Roman Church is not now capable of contracting marriage except in the presence of his *parochus*, parish priest or deacon, or of some other priest deputed by the *parochus* or the Ordinary, and in the further presence of two witnesses. As before, the sacrament is celebrated and the contract is made by the spouses. The priest is but a necessary witness (p. 182). He must be there and know what is going on; but he may be an unwilling witness. Still the effect of this reform is enormous. Unless the country is in such disorder that you can kidnap your priest, you must have him there of his own will. Not only will he refuse his presence, unless the proper publications (our banns) have been made; but it will be his duty to do so if the marriage though valid when made ought not for some Church reason to be made, or not to be made at that time or season, or without dispensation. Practically under this system *impedimenta impeditiva* become *impedimenta dirimentia* (vol. II. p. 288).

Chapter iv. gives with much refinement of inquiry the after effects, *répercussions*, of the decree of the Council of Trent. In this chapter and in the next the author has largely availed himself of the judicial decisions which have construed the decree, referring constantly to the reports of causes decided by the standing Congregation of Cardinals appointed to interpret the acts of the Council.

In conclusion four matters of interest may be noticed. It is well known that in pre-Revolution France the place of our writ of

prohibition as applied to an Ecclesiastical Court was taken by the *appel comme d'abus*. But it is not so well known that this appeal lies not only from judicial decisions, but from ministerial or official acts or refusals; and that by such an appeal the act of a priest in celebrating an illegal or invalid marriage might be quashed, and in this way the marriage itself brought within the cognizance of the temporal court, and be by it declared void (vol. I. p. 42).

The origin of our damages for breach of promise may be traced in damages for refusal to proceed from betrothal to marriage (vol. I. pp. 52, 136, 142).

The institution of the *Defensor matrimonii* (vol. II. p. 292) may have suggested our intervention by the Queen's Proctor. The *Defensor* has however a wider and higher sphere of duties. It would be well if our Queen's Proctor had the like.

Lastly, the book is full of instances of that division which has cut so deep in the Roman Church, and which explains many of the phenomena of the fifteenth and sixteenth centuries—the division between theologians and canonists (see vol. I. pp. 79, 300, 304; vol. II. pp. 243, 327).

Altogether the book is a mine of interesting information, and its arrangement is excellent.

WALTER G. F. PHILLIMORE.

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## REVIEWS AND NOTICES.

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Short notices do not necessarily exclude fuller review hereafter.

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*A Treatise on the Specific Performance of Contracts.* By the Right Hon. Sir EDWARD FRY. Third Edition. By the AUTHOR and EDWARD PORTSMOUTH FRY. 1892. London: Stevens & Sons, Lim. La. 8vo. x and 836 pp.

IF the subject of specific performance does not occupy much space in the reports of judicial decisions published during the last two years, we cannot help thinking that this is partly due to the excellent exposition of the law contained in the former editions of this standard work. Of the new cases which have been reported, a careful use has been made in the present edition, and this, as might have been expected, has been done without any disturbance to the lucidity of arrangement, accuracy of statement and refined sense of proportion, with which the former editions have made us familiar. A text-book writer cannot, as a matter of course, make the law appear more logical or consistent than it is, and the law of specific performance is not satisfactory on all points, but when the difficulties are clearly pointed out, as difficulties, the student is always on firm ground and the practitioner knows that he must be cautious. Such warnings are not infrequent in Lord Justice Fry's book. Thus the unsatisfactory position of the doctrine derived from *Lumley v. Wagner*—already referred to in the last edition and since then judicially noticed by the Lord Justice (then Mr. Justice Fry) in *Donnell v. Bennett*, 22 Ch. D. 835, 840—is again brought out with increased emphasis (on p. 396—where the words used by Lord Justice Lindley in his judgment in *Whitwood Chemical Co. v. Hardman*, '91, 2 Ch. 416, to the effect that he looks upon *Lumley v. Wagner* 'as an anomaly which it would be dangerous to extend,' are quoted with approval). In the same way the observations as to the inconsistencies in the course of the authorities on the question, as to how far payment of money may be considered as part performance of a contract, had to be retained in the present edition, *Nunn v. Fabian* having in the meantime been followed in *Conner v. Fitzgerald*, 11 L. R. (Ir.) 106, notwithstanding Lord Esher's dictum in *Humphreys v. Green* (10 Q. B. D. 148, 160).

The question whether the Judicature Acts have extended the applicability of the doctrine of part-performance has been repeatedly discussed by the courts since the appearance of the last edition. The cases are summarised and partly criticised on p. 276, and it is worth while to call attention to the passage as a pattern of terseness and pregnancy of expression.

The paragraphs on the effect of the Married Women's Property Act are another instance of that combination of brevity and accurate completeness which marks the master hand. The author is of opinion that a judgment directing a married woman to do something other than the payment of money can be enforced by attachment, but as yet there is no reported decision on the subject.

The observations on p. 259 with reference to some recent cases, in which

the influence of subsequent correspondence on contracts formed by letters was discussed (*Bellamy v. Debenham*, 45 Ch. D. 481, and *Bristol &c. Bread Co. v. Maggs*, 44 Ch. D. 616), deserve special attention, and it is to be hoped that the proposition that 'if the letters of proposal and acceptance in fact contain all the terms agreed on at the time and were written with the intent of binding the writers, this complete contract could not be affected by subsequent negotiations not resulting in a new contract,' will not in future be questioned.

The additional note on *Bolton Partners v. Lambert* (41 Ch. D. 295) points out the difficulties, both practical and legal, which result from the decision in that case.

The historical survey on pp. 8-15 is a valuable addition. The readers of this REVIEW will already know from Lord Justice Fry's article on 'Specific Performance and *Laesio Fidei*' (L. Q. R., v. p. 235), that he traces the origin of the equitable jurisdiction relating to specific performance to the ecclesiastical courts and their endeavours to give relief against '*laesio fidei*.' An additional note (on p. 716) collects the cases illustrating the adoption of this jurisdiction by the Chancellors.

As regards the statements on foreign law on p. 4, and in the additional note on p. 715, we are compelled to differ from the opinion that the specific enforcement of contracts has a more extensive application in England than on the continent. If we had to express the difference between English and continental law in this respect in a few words, we should say that in England specific performance is granted where damages are not an adequate remedy, whilst on the Continent damages are awarded when specific performance is impossible, and also that the means of enforcement are more varied on the Continent than in England.

As regards French law, our opinion is supported by the following extract from Mr. Demolombe's *Traité des Contrats* (2nd ed. vol. i. p. 486): 'Il est vrai qu'à Rome toutes les sentences du juge aboutissaient à une condamnation pécuniaire . . . mais jamais nous n'avons admis en France ces formes de procédé toutes-romaines; il faut tenir au contraire chez nous pour règle que le créancier est fondé à obtenir l'exécution même de l'obligation toutes les fois qu'il est possible de la lui procurer.' The well-known § 1142 of the French Civil Code does not in effect prevent any contracts from being specifically enforced except positive and negative contracts relating to personal services. It is true that contracts of the latter kind are in this country enforced by injunction, but this is done in consequence of a decision which, as mentioned above, must be looked upon as an anomaly. Apart from this one exception we are in our opinion safe in asserting that any contract, the specific performance of which can be obtained in England, can also be specifically enforced in France. The French Courts do not threaten the defendant with imprisonment in case of disobedience, but wherever it is possible to do so they authorise the plaintiff by his own act to bring about the result which would have been obtained if the defendant had performed his obligation. Even the '*obligation de faire ou de ne pas faire*' may in many instances be enforced in this manner (Code Civil, §§ 1143 and 1144), but most of the cases in which specific performance is ordered in England would be classed under the head of the '*obligation de donner*' (to which—as mentioned in the note—Sir Frederick Pollock has called attention). As provided by § 1136 '*l'obligation de donner emporte celle de livrer la chose*.' In case the defendant neglects this duty the plaintiff may be authorised to take possession '*manu militari*' (see Demolombe, l. c., p. 380). It is true that in the case of sales, specific performance is unnecessary as the contract

operates as a conveyance, but the 'obligation de donner' may arise in other ways, e.g. in the case of a contract of letting (see Code Civil, § 1719).

In Germany specific performance may be obtained in a much more extensive manner than in France or in England, and it is not probable that the rule of Roman Law, which converted all claims arising from obligations into money claims, was at any time acted upon in the first-named country. On the other hand, there is evidence dating back to the thirteenth century of the opposite rule having been applied (see *Stobbe*, *Deutsches Privatrecht*, first edition, vol. iii. p. 228; *Planck*, *das deutsche Gerichtsverfahren im Mittelalter*, vol. ii. p. 264). Instances of actions, in which the delivery of land or chattels was claimed on the ground of contracts for sale, are mentioned in the *Sachsenspiegel*, I. 9. § 1 (about 1230) and *Richtsteig Landrechts*, 19. § 3 (about 1330), and the nature of such actions as actions for the specific performance of contracts is clearly pointed out by Heusler (*Institutionen des deutschen Privatrechts*, vol. i. pp. 390-394). The plaintiff in earlier times was authorised to take the defendant into his personal custody until he had complied with the order; but in later times a disobedient defendant was confined in the public prison (*Planck*, l.c., p. 260). As regards the modern German Law, Professor Dernburg in his well-known book on Prussian Private Law (third edition, vol. i. p. 276), states that 'Roman law in its classical epoch assumed that every judgment must be for damages in money and the older conception has still a material influence on the law of Justinian. According to modern law the claim and the judgment must be for specific performance (*spezifische Erfüllung*) as long as specific performance is possible' (see also Forster-Eccius, *Preussisches Privatrecht*, fourth edition, vol. i. pp. 551, 899). The German Code of Civil Procedure (which since 1879 is in force throughout the German Empire) provides for the enforcement of judgments for the performance of contracts (1) by direct interference with the subject-matter, e.g. by authorising the plaintiff to take forcible possession (§§ 769-771), by allowing the promised act to be performed by a third party at defendant's expense (§ 773), by directing the judgment of the Court to have the same effect as if the defendant had executed an instrument, the execution of which was contracted for (§ 779); (2) by punishing the defendant by fine or imprisonment in case of disobedience (§§ 774-775). In some German States orders may be made for the specific performance of a promise to marry, but such orders cannot under any circumstances be enforced by compulsion, and would in case of disobedience create a claim for damages; orders for the restitution of conjugal rights cannot be enforced by fine or imprisonment unless the local law allows it. Subject to these exceptions any order of a German Court directing a defendant to do or abstain from any act may be enforced as mentioned, and the specific performance of contracts therefore covers a much wider ground in Germany than it does in this country. E. S.

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*The Law and Custom of the Constitution.* Part II. The Crown. By Sir WILLIAM R. ANSON, Bart., D.C.L. Oxford: Clarendon Press. 8vo. xxiv and 494 pp. (14s.)

SIR WILLIAM ANSON'S *Law and Custom of the Constitution* is the most valuable treatise which has appeared for years on the English Constitution as it actually exists. The merit of the work as a mine of information cannot escape even the most careless of readers; there is however a possibility that the details with which the book is filled may

conceal, even from intelligent critics, the special gifts of the author as an expounder of the working of the Constitution. It is on these special characteristics that it is worth while therefore in this brief notice to insist.

Sir William Anson displays, in the first place, an extraordinary capacity for research.

No doubt some of our readers will be startled by this assertion. Our author does not pretend to be an antiquarian, and a most unfortunate idea prevails that research, by which is really meant the investigation into, and discovery of, facts not easily ascertainable, means the enquiry into the origin of institutions, and, speaking generally, into the obscure and uncertain phenomena of early history. But if the term be used in its true and rational sense, it will be hard to point to any writer who has shown greater capacity for the carrying out of profitable research than Sir William Anson. His object has been to ascertain not only from books, but, what is often far more difficult, from official records, from the practice of men concerned in carrying on the government of the country, from the careful examination of official forms and the like, how the administration of public affairs in England is actually carried on. No one who has not occasionally attempted a task of somewhat the same kind can tell how difficult is its successful achievement. Officers in the public departments are, it is true, usually gentlemen of far more than average intelligence, and are very ready to communicate their knowledge of official routine and habits to any one who is enquiring with a sincere desire to learn. But persons versed in the practice of affairs rarely have time to explore the principles of the business in which they are engaged. Moreover, the things which to officials are a matter of course are the proceedings, which it naturally does not occur to them to explain, and which yet to an intelligent enquirer most need explanation. There is hardly a page in the *Law and Custom of the Constitution* which does not make clear some matter of detail which the reader feels he has never before completely understood, and each detail of this kind has, we may be sure, been ascertained by our author through a process of laborious, intelligent, and assiduous research.

The Warden of All Souls, in the second place, possesses the gift of summarising the general effect of lengthy investigation in a few clear expressions.

Writers on the Constitution tend for the most part towards diffuseness. You hardly ever find a constitutionalist who can compress the results—often, we may add, very small results—to which his enquiries have led him. Rare, for example, is the writer who can tell us what he means by an established Church. Our author, on the other hand, knows precisely what he means, and can express his meaning briefly. ‘The Church of England,’ he writes, ‘like the established Presbyterian Church of Scotland, differs from other religious societies in this, that the conditions of membership are endorsed by the Legislature, and cannot be altered without legislative enactment. In this sense the law of the Church is the law of the land. It cannot be altered at the pleasure of the members of the Church. Convocation could not, even with the most ample license from the Crown, alter or repeal any one of the Articles, or vary the rubric settled in the Prayer-book. To do this recourse must be had to the Crown in Parliament.’ This single paragraph sums up nearly all that a lawyer need say on a subject which has perplexed lawyers no less than divines.

But the rarest of Sir William Anson’s gifts is his capacity for the historical elucidation of Constitutional Custom.

He does not pretend to be an historian: he does not try to do badly and inadequately the work which Hallam and Stubbs have done excellently and fully. On the other hand, he does not try to treat institutions which are the fruit of long historical development as though they had been created yesterday under the direction of modern statesmen and jurists. He neither writes history nor overlooks history. What he does do is to use historical knowledge so far as it elucidates our modern institutions, and so far only. It is this mode of treatment which gives immense importance and extreme interest to the admirable chapter on the Councils of the Crown. It is (if we except Bagehot's account of the Cabinet) quite the most original and best account of Cabinet Government in England which has ever been presented to the public. The intellectual feat performed by Mr. Bagehot of, for the first time, explaining what Cabinet Government really is, cannot from its nature be repeated. But Sir William Anson has certainly explained, as no one before him has ever explained, the steps by which the Cabinet has been developed and the very singular change which has come over the nature of the Cabinet within little more than a century. To most readers, at any rate, the distinction between the outer Cabinet and the inner Cabinet, between the position of a statesman who is a member of a Cabinet, but not one of the efficient Cabinet ministers, and the position of a statesman who, like Lord Mansfield, was a member of the outer Cabinet, but was not a member of the *Cabinet Council with communication of papers*, will come as a surprise. But the new idea when once grasped solves many problems in the constitutional history of the last century which puzzle students, and also suggests many possibilities as to the constitutional history of the future. One thing at least our author has made perfectly clear. The Cabinet, as it is the most important and original, so it is also the most flexible part of the English Constitution; it lends itself to adaptation: it never remains long in the same state. We may doubt whether the Cabinet presided over by Lord Salisbury is quite the same sort of body as the Cabinets presided over by Lord Palmerston; it certainly differs essentially from the Cabinets of Pitt or of Walpole. It is at least conceivable that within the next twenty years the distinction between the outer and the inner Cabinet may again make its appearance. But our space forbids the following out of these speculations. This notice will have attained its object if it convinces those who read it that the Law and Custom of the Constitution, though an admirable law book, is not a book merely for lawyers, but a treatise full of interest for every one interested in political speculation.

A. V. D.

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*La Condition de la Propriété dans le Nord de la France. Le Droit de Marché.* Par J. LEFORT. Paris: E. Thorin. 1892. vii and 223 pp.

MONSIEUR LEFORT's treatise on the *Droit de Marché* has at the present day a special interest for Englishmen. The *Droit de Marché* is, in fact, nothing else than French tenant right. In a particular part of France, and mainly in Picardy, tenants have for two or three centuries at least, and it may be for a much longer period, claimed rights over their land exactly equivalent to the rights claimed by Irish tenants. The French tenant claims not to be evicted whilst he pays his rent; he considers his rent on the strict view of his rights as incapable of being raised; he claims the right to dispose of the goodwill or tenant right in the land, which often

amounts to more than the value of the nominal rights of the legal owner. These claims on the part of certain French tenants have no acknowledged legal basis; they are entirely opposed to the whole spirit of French law; yet they are claims which landowners find it best to treat as rights, for they are enforced by popular opinion, by conspiracy, by boycotting, by maiming of animals, by the burning of homesteads, by the murder of land-grabbers, and by the murder of the friends of land-grabbers. From the time of Louis XIV downwards, the French Executive and the French Courts have opposed with the utmost rigour a system of tenure inconsistent with the fundamental principles of French jurisprudence; yet in the contest with a limited number of peasants the French Government has entirely failed. The *Droit de Marché* still exists. If it is dying out at all, which is not quite certain, it is perishing under the influence, not of hostile legislation, but of changing social conditions. All these facts were known to those who have studied Mr. R. E. Prothero's writings. But Mons. Lefort gives an exhaustive description of the whole system of the *Droit de Marché*, whilst Mr. Prothero naturally refers to it only incidentally. The essential fact, however, which both writers bring out is that all the most characteristic phenomena of the agricultural conflict in Ireland have been known for generations in France. From this two inferences at least, which are of considerable importance, may be drawn.

The first and most obvious is that no conflict is so hard to bring to an end as a conflict between a Government and its subjects as to the tenure of land. The French tenant is not divided from his landlord by race or by religion. The tenants who uphold the *Droit de Marché* have never regarded the Government at Paris as an alien power; yet for all this, French tenants have resisted the claims of their landlords, though backed by a despotic Government, at least as vigorously and, we may add, as savagely as Irish tenants have resisted the rights or exactions of landlords who belonged to, or were supported by, the English garrison.

The second and more general inference is that enthusiasts for the historical method are perhaps too apt to assume that similarity in the institutions of two peoples are signs of a common origin. Enquirers sometimes forget that similar circumstances of themselves produce similar institutions. The comparative method is at least as important as the historical method of investigation.

A. V. D.

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*Constitutional Legislation in the United States: its origin, and application to the relative powers of Congress and of State Legislatures.*  
By JOHN ORDRONAU, LL.D. Philadelphia: T. & J. W. Johnson & Co. 1891. 8vo. vi and 696 pp.

THIS work of Mr. Ordronaux purports 'to present in a concrete form' a part of the Constitution of the United States, the part selected being 'the entire system of Federal and State Legislation.' To work out his scheme he gives us a good deal of history and a good deal of political theory, and perhaps these are not kept apart with sufficient distinctness from the main purpose of the work; but the scheme is nevertheless clear and intelligible. The first chapter, on the sources of representative government, states the general theory of popular institutions; the next, on the organization of representative government, gives us the disposition of political power in the United States. The third chapter contains an interesting account of the relations of the States to the Federal govern-



ment. Then we pass to the various legislative bodies, the limits on their powers and the mode of their working, together with the sort of law-making effected by the Supreme Court in judicial interpretations of the Constitution. The last chapter, on the Mechanics of legislation, deals with a topic which does not often meet with the attention it deserves. We are always complaining of the uncouth complexity of the Statute-book and the difficulty of carrying a bill through the House of Commons without the introduction of some unintelligible matter, but the art of law-making has not in England, so far as we are aware, received literary treatment.

Mr. Ordronaux is, as in duty bound, an enthusiastic admirer of the American constitution. 'To us it seems inconvenient that provisions now more than 100 years old should be unalterable save by a process of extreme difficulty. There should be some *via media* between the exorbitant powers possessed by our own Parliament for altering the institutions under which we live, and the helplessness of the American legislature in the presence of the sacred document of the Constitution. Yet Mr. Ordronaux tells us (p. 209) that 'sixty-six legislative bodies must assent to any proposed amendment before it can form part of the Constitution:' and asks proudly, 'Is there any nation on the globe whose organic law is hedged about and buttressed by such mountains of popular assent as these sixty-six legislative houses represent?' We should hope not. The mountains of popular assent must be an incubus on the operation of the national will.

The fact that our Statute-book represents the current political ethics of successive generations is, to the mind of Mr. Ordronaux, 'a fearful indictment of constitutional as well as political morality:' yet it would seem more in character with genuine democracy that the people's laws should represent the people's opinions at the time and should not be subject to the limitations imposed by the wisdom of remote forefathers.

In some respects, too, the terminology of the book might be clearer: in the section of ch. iii, headed 'Origin of the State,' we are constantly puzzled by changing uses of the word 'State' as signifying sometimes the community, sometimes the disposition of forces in the community, sometimes one of the United States. Prerogative is a word to which an air of mystery may well cling, but the privileges of the House of Commons should not be confounded with their legislative powers (p. 359), nor is it true to suggest that inroads on the prerogative of the Crown were made by the Commons alone.

A good table of contents would be of value to a work in which some chapters contain very miscellaneous matter. But these minor shortcomings do not prevent the book from being an interesting and useful addition to the literature which has grown up around the American Constitution.

W. R. A.

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*A Digest of the Principles of the Law of Contracts.* By S. MARTIN LEAKE. Third Edition. London: Stevens & Sons. 1892. lxxxvi and 1164 pp. (32s.)

THE treatise of Mr. Leake has always commanded a high position in legal literature from the clearness of its language and its happy combination of brevity with exactness. The last edition appeared so far back as 1878. In this new edition the author tells us that 'he has endeavoured to revise the work strictly for the service of the profession, with the single aim of presenting a convenient digest of the leading principles of the law of

contracts as derived from judicial exposition,' abandoning the view, formed when the work was originally prepared, of making it to some extent a students' book. We hardly discover any change, but there is no doubt that Mr. Leake's style and mode of treatment is far better suited to the practitioner than the student, who would in many cases suffer not a little from inability to comprehend matter so closely packed.

Turning from generalities to particulars, we are glad to find that the Married Women's Property Act of 1882 with its bundle of explanatory cases has been quite satisfactorily treated, and the effect of *Palliser v. Gurney*, L. R. 19 Q. B. D. 519, *Scott v. Morley*, L. R. 20 Q. B. D. 132, and suchlike familiar decisions effectively brought out.

In dealing with *Read v. Anderson*, L. R. 13 Q. B. D. 779, however, our author is far from happy. He cites this celebrated, and, as we have always thought, wrongly decided, case on six separate pages, but on only one of them do we learn that Brett M.R. dissented from the judgment of the Court of Appeal, and on none of them have we any notice of the disapproval of it by Manisty J. in *Cohen v. Kittell*, L. R. 22 Q. B. D. 689, much less any independent criticism of the author's own. Nor has occasion been taken, in dealing with *Mogul Steamship Co. v. McGregor* (1892), App. Cas. 25, to point out its indirect effect upon *Hilton v. Eckersley*, 25 L. J., Q. B. 199; but looking to the very recent date of the report of the judgment of the House of Lords as compared with Mr. Leake's preface, we ought perhaps rather to thank him for what he has given instead of blaming him for what he has not.

We have only to add that the index is quite up to the mark, but that a 'table of statutes cited' has been most unhappily withheld.

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*The Institutes of Roman Law.* By RUDOLPH SOHM, translated by JAMES CRAWFORD LEDLIE, with an Introductory Essay by ERWIN GRUEBER. Oxford: Clarendon Press. 1892. 8vo. xxxv and 520 pp. (18s.)

THE English student of Roman Law has for some time past been provided with admirable commentaries upon the institutional writers, and even upon certain portions of the Digest at large. He has however still felt the need of some such systematic exposition of Roman Private Law, as a whole, as is obtained in Germany from the works known as 'Institutionen.' This need the Clarendon Press has at length supplied. Professor Sohm's reputation rests mainly upon his researches into the early Teutonic codes; but his excursion into the domain of the specialists in Roman Law has been more than justified by its results.

Of the numerous 'Institutionen' which compete for the 'cupida legum iuventus,' some are repulsively dry in treatment, one of the best (Puchta's) is unfinished, many tediously repeat their predecessors, others are too difficult for the beginner. Sohm's work is free from all these defects. Its appearance in 1884 was an event in Academical circles, and its continued success is attested by its already having attained a fourth edition. The work is essentially fitted to arrest and retain the attention of the reader, and Mr. Ledlie has been very successful in preserving in his translation much of the freshness and force of the original. His task has been no light one, as he explains in his preface; and it is more easy to criticize some of his renderings (e.g. of 'Forderungsrecht' by 'obligatory right') than to improve upon them. Certain details of Sohm's own method are no doubt

open to serious question; but the student who has some knowledge of the subject from other sources will perhaps hardly need to be warned that the inclusion of 'Procedure' in 'The Law of Property' is an eccentricity to be excused only in so far as it is suggestive of a new point of view.

The 'Introductory Essay' by Dr. Grueber must not be passed over without separate mention. It contains a survey of the fortunes of Roman Law on the Continent and in this country which could hardly be found elsewhere. The writer has turned to happy account his exceptional opportunities, as a graduate of Munich and a Professor at Oxford, to produce a most interesting monograph, in which he traces the development of the study from Italy, through France to Germany: from the glossators and post-glossators, through the humanists of the renaissance, the apostles of the Law of Nature, and the advocates of the Historical Method, down to the modern severance of 'Deutsches Privatrecht' from the 'Pandekten.' Dr. Grueber then proceeds to enquire how far a similar process is observable in England, and to account, with unusual mastery of the authorities, for the character of the recognition which the study has obtained amongst ourselves. We hope to return hereafter to a work which deserves a fuller notice than its recent appearance at present permits.

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*A Treatise on the Law of Merchant Shipping.* By DAVID MACLACHLAN.  
Fourth Edition. London: Sweet & Maxwell. 1892. La. 8vo.  
xlvii and 1075 pp. (£2 2s.)

THIS book has been before the public for upwards of thirty years, and has established its position as a standard work upon merchant shipping law. It is remarkable for the freedom and energy with which the author criticises judgments with which he disagrees. Examples of his method will be found at pp. 679 and 690 of the present edition. Recent cases show that the ancient controversy between the 'beneficent' (MacLachlan, p. 690) jurisdiction of the Admiralty Court and the Common lawyers has not entirely died out. The present Master of the Rolls still guards the floodgates of that jurisdiction, which he appears to agree with Lord Coke in thinking by no means beneficent (see '92, 1 Q. B. 299). It is worthy of notice that the present edition of Mr. MacLachlan's book exceeds in bulk its predecessor by forty pages only—a subject of congratulation in a work upon so large a subject. And this increase in bulk is partly due to the ever increasing number of statutes, which, as is intimated in the preface, are rapidly becoming a scandal to the legislature. Mr. MacLachlan's is a 'general' treatise, and in it the reader will find no extended reference to the knotty subjects of insurance and pilotage authorities. The exclusion of these topics has, at least, the merit of lightening the volume. As to smaller matters we remark: that there has been no Wreck Commissioner for some time past, though p. 299 would lead the reader to suppose that a successor to the late Wreck Commissioner had been appointed; 26 Vict. c. 24, cited p. 70 as to Colonial Vice-Admiralty Courts, has been repealed by 53 & 54 Vict. c. 27; *The Urania* is not to be found (see Ta. Ca.) on p. 373, but is to be found at p. 673; to *The Urania*, 10 W. R. 97, much discussed in a recent case, there is no reference; the suggestion, p. 294, that in an ordinary towage the crew of the tow are under the orders of those on board the tug is not in accordance with the law as laid down in *The Niobe*, 13 P. D. 55, 59, or as subsequently stated by Mr. MacLachlan (p. 296), referring to *The Christina*, 3 W. Rob. 27 (which case, however, is incorrectly cited as *The Christiana*);

*The Mary*, 5 P. D. 14, is a doubtful authority for the point of law to establish which it is cited on p. 297; the passage as to a certificate for costs being necessary where County Court actions are brought in the High Court requires a reference to *Garnett v. Bradley*, 3 Ap. Ca. 944, and cases like *The Asia*, '91, P. 216, which have followed it; *The Kong Magnus*, '91, P. 223, seems to need mention on p. 334, and the mode of citing the same case p. 616, '1 P. D. (1891) 223,' is not convenient; the well-known *Missouri Steamship Co.* case is not omitted from the L. R., as the reference (p. 405) might lead the reader to suppose. Lastly, in the index under tit. 'Negligence,' we expected to find some reference to the much discussed subject of shipowners exempting themselves by bill of lading from liability for the negligence of their agents.

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*The Law of Trading and other Companies*, formed or registered under the Companies Act 1862. By EDWARD MANSON. London: William Clowes & Sons, Lim. 1892. La. 8vo. cxxviii and 966 pp. (35s.)

THIS book is a Dictionary of Company law. It is perhaps unique among law-books in that it boasts no index. This is because the book is itself an index. So far as we can see it is a good and a well-arranged index. Some idea of its exhaustiveness may be conveyed by the fact that, as we have computed, there are about four thousand cases cited. They are cited in the most convenient fashion, with the date and an indication of the name of the Judge, and with all the references to contemporaneous reports given in the Table. Indeed, Mr. Manson's work strikes us as one of almost preternatural industry. We have found hardly a loose joint in his harness, and we think there is a great deal to be said in favour of a Company book, upon the dictionary principle, to be useful in the hands of secretaries and managers. Mr. Manson has compiled, with infinite pains, a digest of Company law—both statutory and judge-made—which is at once accurate and complete. The headings and catchwords are well chosen, and the cross-references are abundant. The single deviation from accuracy which we have noted is the reference on p. 360 to secs. 211 and 212 of the Companies Act 1862, without a sign to show that the sections have been repealed by the Statute Law Revision Act 1875. Of course we do not expect to find in a digest like Mr. Manson's the independent criticism and forcible reasoning which is to be found in the pages of Lord Justice Lindley and Mr. Buckley. But by two samples Mr. Manson has proved that he is capable of forming a logical judgment of his own; we mean by his notes on the 'Waiver Clause' in prospectuses, the only sin of which excursus is that it is too full of legal maxims, and on Founders' Shares, in the mischievous character of which we cordially concur. These are enough to show that Mr. Manson is no mere maker of digests: he is equal, as our pages have proved, to much higher efforts. Nevertheless his main effort in the book before us has been to present a convenient digest, and in that effort he must be adjudged successful.

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*Leading Cases and Opinions on International Law.* By PITT COBBETT. Second Edition. London: Stevens & Haynes. 1892. 8vo. xxiv and 385 pp.

THE second edition brings this useful work thoroughly up to date, and contains, among other new matter, appendices dealing with the Behring

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Sea Controversy and the Newfoundland Fisheries Question. Students will find the book of especial value as presenting information on all branches of International Law with a clearness and method which in most works on this subject are noticeable by their absence: indeed, apart from the form of Professor Cobbett's book, it is only in this respect that it now differs from an ordinary text-book of International Law, the increase from the 263 pages of the first edition to the 385 of the second, caused by a general amplification of the notes appended to the cases, bringing it into the position of an independent rather than an accessory treatise. The author had two alternatives before him: by curtailing the number of 'leading' cases, and compressing the notes, of his first edition he might have produced a book of the greatest service as a key to such works as Wheaton and Hall: he has chosen, however, to expand it into a volume which for many readers will doubtless altogether replace more weighty tomes.

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We have also received:—

*The Annual County Courts Practice*, 1892. Founded on Pollock and Nicol's and Heywood's Practices of the County Courts. By His Honour Judge HEYWOOD. Two vols. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1892. 8vo. Vol. I, xxxvi and 946 pp.; Vol. II, xiv and 438 pp. (25s.)—The current edition of the Annual County Court Practice is of more than usual importance, embodying as it does the alterations and amendments of the County Court Rules and Scales of Costs of 1892. The most important change perhaps made by these rules was the entire recasting of the rules of Admiralty County Court Practice with the view to securing uniformity in all Courts, but the considerable revision in the Scales of Costs will probably require the more immediate attention of the ordinary practitioner. The whole of these new rules have in the edition before us been worked into the text with the most careful accuracy, and the useful index and excellent arrangement of the work enable the advocate with ease and rapidity to ascertain the rules of practice on difficult points which crop up in the course of a case. The recent decisions (especially that of the C. A. in *How v. L. & N. W. Ry. Co.*, '91, 2 Q. B. 496) which have partially cleared up the vexed questions as to appeals from interlocutory orders are noted with due care, and we can find no recent cases of any importance on County Court Practice which have been omitted from this edition except those which have either like *France v. Dutton*, '91, 2 Q. B. 208, been met by amendments in the rules, or, like *Dod, Longstaffe & Co. ex p. Lamond*, 21 Q. B. D. 242, been practically superseded by still more recent authorities.

S. H. L.

*Rogers on Elections. Part II. Elections and Petitions.* Sixteenth edition. By S. H. DAY. London: Stevens & Sons, Lim. 1892. 8vo. xxxii and 900 pp.—A book which is in its sixteenth edition needs no words from us to show how highly it has been and is appreciated by practitioners. 'Rogers on Elections' has made a place for itself in the lawyer's library. That place it well deserves to keep, while it is in such good hands as Mr. Day's. It is a mine of information on all things connected with Elections, whether Parliamentary, Municipal or Local Government. We have detected no omission of any fact, either in statutory or in what is called 'judge-made' law. The only quarrel we have with Mr. Day is that he is a trifle chary of expressing his views upon burning questions which remain undecided. There is, for instance, no answer attempted in these pages to

the question which is causing many searchings of heart to-day, When do the expenses of an election begin? All that Mr. Day does is to refer to the few cases which have been decided thereanent, without attempting to deduce rule or principle from the decisions.

*Les destinées de l'arbitrage international.* Par E. ROUARD DE CARD. Paris: Pedone-Lauriel. 1892. 264 pp.—At the present moment when Great Britain is involved as a party in two momentous matters about to be submitted to arbitration, a book on the progress of this new and bloodless method of settling international disputes will interest many readers. The author, who is a Professor of the Law School of Toulouse, examines the different disputes in which recourse to arbitration has been had, the nature of the movement in its favour, and the effect of clauses in treaties providing for arbitration in case of disputes in the future.

As regards the disputes which have been arranged he finds they can be grouped as follows: five as to the fixing of frontiers, two as to the right to possession of territory, five as to the seizure of vessels and confiscation of cargo, three as to violent and arbitrary acts towards foreigners, one as to rights of navigation, two as to rights of fishery, and one as to the settlement of an account. These are all matters involving material interests and in which the sovereignty or independence of States is not concerned. In fact M. Rouard de Card is of opinion that, though several American States have taken the engagement towards each other to submit their differences to arbitration, not much progress is to be expected wherever the independence or sovereignty (we might on our own account add dignity) of States is concerned. He says:—

‘Il est évident que les Etats signataires de ces traités n’hésiteront pas à décliner la compétence des arbitres toutes les fois que leur indépendance et leur souveraineté se trouveront mises en question. Pour les contraindre à respecter leurs promesses, on devra recourir à l’emploi de la force, mais alors la guerre, qu’on aura voulu prévenir, deviendra nécessaire. Par conséquent, à quoi aura servi la conclusion des traités d’arbitrage permanents! Nous nous bornons à rappeler l’exemple de Salvador et du Guatemala, entre lesquels a éclaté une lutte sanglante, malgré l’existence d’un pacte d’union. Dans la pratique, la justesse de ces objections a été si bien reconnu que les diplomates ont cru devoir modifier la formule des traités. Les dernières conventions portent, en effet, que l’arbitrage cesse d’être obligatoire, lorsqu’il s’agit de questions “qui d’après le jugement exclusif d’une des nations intéressées, compromettraient son autonomie ou son indépendance.”’

A recommendation of the author as regards procedure is to regulate it minutely beforehand or specifically to refer the arbitrators to the rules drawn up for international arbitration by the Institute of International Law.

We remark a precedent that may be worthy of more attention in the future than it has yet met with. It is that a difference between France and Nicaragua as to a seizure of arms on board the French steamer *le Phare* was submitted to the French Court of Cassation. It is doubtful whether many States would care to submit their differences to the Law Courts of their adversary, but submission to the Court of an independent State may be a form in which this precedent may be followed.

*Code de Commerce italien.* Traduit, annoté et précédé d’une introduction. Par EDMOND TURREL. Paris: Pedone-Lauriel. 1892. xxxvi and 306 pp.—This is the fourth volume of a series of translations of foreign codes in course of publication by the enterprising publisher whose name figures above.

The Italian Commercial Code of 1882 is one of the most recent, and has therefore had all the advantage over its predecessors of coming after them. The translator says of it that taking it all in all it is perhaps the best which has issued in late years from the legislative activity of Europe. Its preparation, he tells us, occupied thirteen years, and what was done during that period is instructive as to how Continental Codes are made. In 1869 the Italian Government appointed a first commission composed of jurists, magistrates, and merchants, who held 175 plenary sittings, without counting sub-committee meetings. In 1872 this Commission terminated a Preliminary Draft with an *exposé de motifs* in four big volumes. This Draft was submitted to the Judicial bodies, Chambers of Commerce, and Universities. Later on a fresh extra-parliamentary commission took it in hand, and in 1887 Signor Mancini presented it to the Senate, which adopted it in 1880. Adoption by the Chamber of Deputies followed in 1882, and a last commission under the official chairmanship of the Minister of Justice gave it the finishing touches in view 'd'en faire disparaître les antinomies, d'en améliorer la rédaction, de le mettre en harmonie avec les autres parties de la législation commerciale, et d'y ajouter des dispositions transitoires et réglementaires.'

The translator gives few notes and his index might be more redundant, but the translation so far as we have tested it seems careful and clear.

*Code de Commerce chilien.* Traduit et annoté par HENRI PRUDHOMME. Paris: Pedone-Lauriel. 1892. lxii and 425 pp.—This is another of the series referred to in the preceding notice. A feature of this volume is that it contains notes comparing the Chilian law with that of France. The Code in question came into force in 1867. It is hardly therefore one of the new Codes. A fact to note is that the Chilians in 1866 set the example of abolishing the institution of Tribunals of Commerce, an example in which they have since been wisely followed by Spain and Italy. There is a pretty full index to this volume.

*The Revised Reports.* Edited by Sir FREDERICK POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. IV. 1796-1799, (3 & 4 Vesey—7 & 8 T.R.—1 Bos. & P.—3 Anstruther—2 Peake). London: Sweet & Maxwell, Limited; Boston, Mass.: Little, Brown & Co. 1892. La. 8vo. xviii and 937 pp. (25s.).—The Preface to this volume states that although the period covered (1796-1799) was 'not rich in leading cases of the first rank,' it produced 'many of great importance. *Morton v. Lamb* (7 T.R. 125) is one of the best known and most profitable in the learning of dependent and independent promises. *Gordon v. Harper* (7 T.R. 9) is a landmark in the law of possessory remedies. . . . *Jennings v. Rundall* (8 T.R. 335) is in some sense a leading case on the liability of infants; and on the rule (now much less important than it was a century ago), that substantive liability cannot be altered by changing the form of action. Yet it does not seem clear that the principle was rightly applied in the particular case. However, this is immaterial at the present time.' The editor specially invites 'serious and competent criticism.'

*The Land Systems of British India.* By B. H. BADEN-POWELL, C.I.E. Three vols., containing fourteen maps. Oxford: Clarendon Press. 8vo. xxxii and 2104 pp. (£3 3s.).—We hope to review this work in our next number.

*The Roman Law of Testaments, Codicils and Gifts in the event of death.* By MOSES A. DROPSIE. Philadelphia: T. & J. W. Johnson & Co. 1892. xi and 197 pp.

*The Contract of Sale in the Civil Law with reference to the Laws of England, Scotland, and France.* By J. B. MOYLE. Oxford: Clarendon Press. 1892. 8vo. xiii and 271 pp. (10s. 6d.)

*Parliamentary Procedure and Practice, with a view of the origin, growth, and operation of Parliamentary Institutions in the Dominion of Canada.* By JOHN GEORGE BOURINOT. Second edition, revised and enlarged. London: Sampson Low, Marston & Co., Lim. 1892. 8vo. xx and 929 pp.

*The Ottoman Land Code.* Translated from the Turkish by F. ONGLEY. Revised, with marginal notes and index, by HORACE E. MILLER, LL.B. London: W. Clowes and Sons, Lim. 1892. 8vo. xii and 396 pp.

*Concise Precedents under the Companies Acts 1862 to 1890.* By F. GORE-BROWNE. London: Jordan & Sons. 1892. 8vo. xxiv and 548 pp. (10s. 6d.)

*A Handy Book on the Formation, Management, and Winding Up of Joint Stock Companies.* By W. JORDAN and F. GORE-BROWNE. Fifteenth edition. London: Jordan & Sons. 1892. xxiv and 312 pp. (3s. 6d.)

*Handy Guide to County Court Costs.* Second edition. By JOHN HOUGH. London: W. Scott. 1892. 8vo. 180 pp. (5s.)

*The Practice of the Supreme Court and Court of Appeal of New Zealand.* By Sir ROBERT STOUT and W. A. SIM. Dunedin: James Horsburgh. 1892. La. 8vo. xxxvi and 262 pp.

*The Crown Lands Acts now in force in New South Wales.* By A. P. CANAWAY. Sydney: C. F. Maxwell. 1891. La. 8vo. viii and 337 pp. (21s.)

*A Treatise upon the Employers' Liability Act of New South Wales.* By C. G. WADE. Sydney: C. F. Maxwell. 1891. 8vo. xvi and 210 pp. (12s. 6d.)

*Property: its Origin and Development.* By CH. LETOURNEAU. London: Walter Scott. 1892. 8vo. xii and 401 pp. (3s. 6d.)

*Synthèse de l'antisémitisme.* Par EDMOND PICARD. Brussels: Larcier. Paris: A. Savine. 1892. 8vo. 232 pp. (3 fr.)

*La question d'Alsace.* Par JEAN HEIMWEH. Second edition. Paris: Hatchette et Cie. 1892. 8vo. x and 253 pp.

*La régime des Passeports en Alsace-Lorraine.* Paris: A. Lahure. 1890. 8vo. 76 pp. (1 fr.)

*The Practice in Lunacy.* By JOSEPH ELINER. Seventh edition. London: Stevens & Sons, Lim. 1892. 8vo. xx and 481 pp. (21s.)

*An Epitome of Real Property Law for the use of Students.* By W. H. HASTINGS KELKE. London: Sweet & Maxwell, Lim. 1892. 8vo. x and 160 pp. (6s.)

*The Roman Law of Sale.* By JAMES MACKINTOSH. Edinburgh: T. & T. Clark. 1892. 8vo. xv. and 272 pp. (10s. 6d.)

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*The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.*

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# STEVENS & SONS' PUBLICATIONS.

(See also page 4 of Wrapper.)

**Elmer's Practice in Lunacy.** Seventh Edition. By JOSEPH ELMER, Esq., late of the office of the Masters in Lunacy. Demy 8vo. 1892. Price 21s. cloth.

**Godefroi's Law relating to Trusts and Trustees.**—Second Edition. By HENRY GODEFROI, of Lincoln's Inn, Esq., Barrister-at-Law. Royal 8vo. 1891. Price 32s. cloth.

"This work is a model of what a legal text-book ought to be. It is clear in style and clear in arrangement."—*Law Times*, April 18, 1891.

**Dart's Vendors and Purchasers.**—A Treatise on the Law and Practice relating to Vendors and Purchasers of Real Estate. By the late J. HENRY DART, Esq., one of the six Conveyancing Counsel of the High Court of Justice, Chancery Division. Sixth Edition. By WILLIAM BARBER, Esq., Q.C., RICHARD BURDON HALDANE, and WILLIAM ROBERT SHELTON, Esqrs., Barristers-at-Law. 2 vols. Royal 8vo. 1888. Price £3 15s. cloth.

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**Carver's Carriage of Goods by Sea.**—A Treatise on the Law relating to the Carriage of Goods by Sea. Second Edition. By THOMAS GILBERT CARVER, Esq., Barrister-at-Law. Royal 8vo. 1891. Price 32s. cloth.

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**Nelson's Private International Law.**—Selected Cases, Statutes, and Orders illustrative of the Principles of Private International Law as Administered in England, with Commentary. By HORACE NELSON, M.A., B.C.L., Barrister-at-Law. Royal 8vo. 1889. Price 21s. cloth.

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**Wheaton's Elements of International Law.**—Third English Edition, with Notes. By A. C. BOYD, Esq., Barrister-at-Law. Royal 8vo. 1889. Price £1 10s. cloth.

"Wheaton stands too high for criticism, while Mr. Boyd's merits as an editor are almost as well established."—*Law Times*.

**Shirley's Selection of Leading Cases in the Common Law.** With Notes. By WALTER SHIRLEY SHIRLEY.—Fourth Edition. By RICHARD WATSON, of Lincoln's Inn, Esq., Barrister-at-Law. Demy 8vo. 1891. Price 16s. cloth.

**Warburton's Criminal Law Cases.**—A Selection of Leading Cases in the Criminal Law, with Notes. By HENRY WARBURTON, Esq., Barrister-at-Law. [Founded on "Shirley's Leading Cases."] Demy 8vo. 1892. Price 9s. cloth.

"We consider that it will amply repay the student or the practitioner to read both the cases and the notes."—*Justice of the Peace*.

**Harris' Hints on Advocacy.**—Conduct of Cases Civil and Criminal. Classes of Witnesses and Suggestions for Cross-examining them, &c., &c. By RICHARD HARRIS, one of Her Majesty's Counsel. Ninth Edition. With a New Chapter on "Tactics." Royal 12mo. 1889. Price 7s. 6d. cloth.

"Full of good sense and just observation. A very complete Manual of the Advocate's art in Trial by Jury."—*Solicitors' Journal*.

**Wigram's Justice's Note Book.**—Containing the Jurisdiction and Duties of Justices and an Epitome of Criminal Law. Sixth Edition. By ARCHIBALD HENRY BODKIN, Esq., Barrister-at-Law. Royal 12mo. 1892. Price 12s. 6d. cloth.

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# STEVENS & SONS' NEW PUBLICATIONS.

(See also page 3 of Wrapper.)

## ELECTION LAW UP TO DATE.

**Rogers on Elections and Petitions**, Parliamentary, Municipal and Local Government, with an Appendix of Statutes and Forms. Sixteenth Edition. By S. H. DAY, Esq., Barrister-at-Law. Royal 12mo. 1892. Price 21s. cloth.

"An admirable storehouse of information."—*Law Journal*.

### **Hedderwick's Parliamentary Election Manual.**—

A Practical Handbook on the Law and Conduct of Parliamentary Elections in Great Britain and Ireland, designed for the Instruction and Guidance of Candidates, Election Agents, Sub-Agents, Polling and Counting Agents, Canvassers, Volunteer Assistants, and Members of Political Clubs and Associations. By THOMAS CHARLES HEDDERWICK, Esq., Barrister-at-Law. Demy 12mo. 1892. Price 7s. 6d. cloth.

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**Fitzgerald's Ballot Act.** With an Introduction. Forming a Guide to the Procedure at Parliamentary and Municipal Elections. Second Edition. By GERALD A. R. FITZGERALD, Esq., Barrister-at-Law. Fcap. 8vo. 1876. Price 5s. 6d. cloth.

**Wharton's Law Lexicon.** Forming an Epitome of the Law of England, and containing full explanations of the technical terms and phrases thereof, both Ancient and Modern, including the various Legal terms used in Commercial Business, together with a Translation of the Latin Maxims and Selected Titles from the Civil, Scotch, and Indian Law. Ninth Edition. By J. M. LELY, Esq., Barrister-at-Law. Sup. royal 8vo. 1892. Price £1 18s. cloth.

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**Addison on Contracts;**—being a Treatise on the Law of Contracts. By C. G. ADDISON, Author of "The Law of Torts." Ninth Edition. By HORACE SMITH, Esq., Benchet of the Inner Temple, Metropolitan Magistrate, assisted by A. P. PERCEVAL KEEP, Esq., Barrister-at-Law. Royal 8vo. 1892. Price £2 10s. cloth.

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**Fry's Treatise on the Specific Performance of Contracts.**—By the Right Hon. SIR EDWARD FRY, a Lord Justice of Appeal. Third Edition. By the Author and E. PORTSMOUTH FRY, Esq., Barrister-at-Law. Royal 8vo. 1892. Price £1 16s. cloth.

**Whitehead's Church Law.**—Being a Concise Dictionary of Statutes, Canons, Regulations, and Decided Cases affecting the Clergy and Laity. By BENJAMIN WHITEHEAD, B.A., Esq., Barrister-at-Law. Demy 8vo. 1892. Price 10s. 6d. cloth.

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**Chalmers' Bills of Exchange.**—A Digest of the Law of Bills of Exchange, Promissory Notes, Cheques, and Negotiable Securities. Fourth Edition. By His Honour JUDGE CHALMERS, Draughtsman of the Bills of Exchange Act, 1882, &c. Demy 8vo. 1891. Price 18s. cloth.

**Palmer's Company Precedents.**—Conveyancing and other Forms and Precedents for use in relation to Companies subject to the Companies Acts, 1862 to 1890. With copious Notes and an Appendix containing the Acts and Rules. Fifth Edition. By FRANCIS BEAUFORT PALMER, assisted by CHARLES MACNAGHTEN, Esqs., Barristers-at-Law. Royal 8vo. 1891. Price 36s. cloth.

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**Powles and Oakley's Probate Practice.**—The Law and Practice relating to Probate and Administration. By L. D. POWLES, Barrister-at-Law, and T. W. H. OAKLEY, of the Probate Registry, Somerset House. (Being a Third Edition of "Browne on Probate," enlarged, re-arranged, and in great part re-written. Demy 8vo. 1892. Price 30s. cloth.

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# THE LAW QUARTERLY REVIEW.

EDITED BY SIR FREDERICK POLLOCK, BART., M.A., LL.D.,

*Corpus Professor of Jurisprudence in the University of Oxford.*

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No. XXXII. October, 1892.

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## NOTES.

ONE word more on *Henthorn v. Fraser*, '92, 2 Ch. 27, C. A. The only new point it decides is that, where contracting parties are not face to face throughout their communications, the making of an offer otherwise than by post is consistent with the offeree being authorised to accept by post, and being bound by the contract and entitled to hold the offeror to it from the moment of posting the acceptance. But the notion of an implied request or authority from the proposer to the acceptor is practically abandoned by both Lord Herschell and Kay L.J. (Lindley L.J. not committing himself on this point), and the rule is put on the ordinary use of the post being within the common contemplation of the parties. Upon this one may note two things:—

a. The result is hardly distinguishable from a fixed rule that, unless a contrary intention appears, the acceptance of every offer of a contract may be communicated through the post, and completes the contract as from the time of posting, whether the offer were made by post or not.

b. The rule is more certain but also more arbitrary than before. In the theory of implied authority we had a reason, though an artificial one, why the proposer rather than the acceptor should take the risk of an acceptance sent by post being delayed or mis-carrying. Now we have none. Perhaps, after all, the most philosophical view of this vexed question is that it is one of those matters of practical life where (as with the rule of the road) it is necessary to have a fixed rule of some kind, though difficult to find conclusive reasons for preferring one rule to another. F. P.

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X died seised of land in fee simple, intestate and a widower, leaving a son Y and a first cousin Z. Are there any and what circumstances in which Z can inherit the land rather than Y?

H. W. E.



'There is in fact no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.' (*Willis v. Baddeley*, '92, 2 Q. B. (C. A.) 324, 326.)

These are the words of an eminent and sagacious judge. They have an air of plain common sense. But they in fact countenance a singular delusion, which we had supposed to have been banished by the labours of Sir Henry Maine from the field of jurisprudence. It is certain that the judges profess only to expound the law. It is equally certain that the judges do, under the fiction of expounding the law, constantly make the law. To apply a law to circumstances to which it has not been authoritatively pronounced applicable, is in fact to legislate. But, to speak plainly, our judges (under which term of course we include the whole line of Chancellors) have gone far further than this. They have, under the form of interpretation, built up whole departments of law. They have not the least reason to be ashamed of their work. The best and the most rational portions of the law of England are the product of judicial legislation. The whole law of contract, to take one example, has been, with very rare exceptions, created by the judges. It may well be doubted whether this branch of the law would not gain both in symmetry and reasonableness by the repeal of every statutable enactment which affects it. We object to Lord Esher's dictum both because it is to our minds based on a misconception as to the mode in which law is developed and because the fallacy it contains impedes the freedom of judicial action. England would gain a good deal if there were less Parliamentary and more judicial legislation. There is after all nothing strange in the fact that Lord Esher and his colleagues should be better legislators than the last batch of newly-elected M.P.s.

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'There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause.' Thus the House of Lords in *Wing v. Angrave* (8 H. L. Cas. 183). Perhaps it would be better if there were, as is the case in the civil law and the Napoleonic code: for here in *In the Goods of Alston* ('92, P. 142) we have a captain and his wife drowned together after making identical wills in favour of one another, with a gift over in case of one predeceasing the other. No evidence being forthcoming of predecease the matter becomes, in the words of Lord Cranworth, 'incapable of solution,' with the result that there is an intestacy and defeat of the testators'

intentions. However, it is not the business of the law to supply facts or to guess at them. Presumptions of law are founded on an experience of what generally happens. In the case of drowning together the data are at present insufficient to show which in fact most often survives.

The apprehensions raised among men of business by the decision of the House of Lords in *Lord Sheffield's* case, 13 App. Ca. 333, will, it is to be hoped, be laid by the reversal of the Court of Appeal's excessive following of that decision in *London Joint Stock Bank v. Simmons*, '92, A.C. 201. We are now to understand that *Lord Sheffield's* case did not affect any principle of mercantile law, but proceeded wholly on the actual notice of the pledgor's limited title which the Bank was held to have had in the special circumstances of that case. But is it altogether satisfactory when judgments in the House of Lords are so framed as to mislead even the Court of Appeal?

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6, 1 (d) provides that 'a creditor shall not be entitled to present a bankruptcy petition against a debtor unless' (*inter alia*),

'(d) The debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England.'

These words are in form purely negative, but a writer so acute and generally, it must be added, so thoroughly trustworthy in his conclusions as Mr. Westlake, has pronounced it the 'better opinion' that these words 'should be read positively as well as negatively so as to give the creditor a right to present a petition in the cases mentioned in them wherever the act of bankruptcy was committed' (Westlake, *Private International Law* (3rd ed.), p. 148). In *re Pearson*, '92, 2 Q. B. (C. A.) 263 is a judicial decision against the view advocated by Mr. Westlake. 'Sect. 4,' says the Master of the Rolls, 'states affirmatively what are to be acts of bankruptcy. Sect. 6 is a negative section, and does not, in my opinion, affect in any way the construction of sect. 4. Unless a case can be brought within sect. 4, it is not necessary to look at sect. 6. If the case is brought within sect. 4, and the debtor is a foreigner, it must also be brought within sect. 6. But, if the case is not within sect. 4, there is nothing in sect. 6 which can bring it within the jurisdiction of the Court. Sect. 6 is only negative.' The result of this view of the Act is that *Ex parte Blain* (1879), 12 Ch. D. 522, is still law and that the Court has no jurisdiction under the Bankruptcy Act, 1883, to allow the

service of a bankruptcy notice upon a foreigner out of the jurisdiction, even though he be domiciled in England, or within a year before the date of the presentation of the petition has had a place of business in England. This exposition of the law coincides with the strict words of the Act. It is however to be regretted that the attention of the Court was not, as far as appears from the *Law Reports*, called to Mr. Westlake's dictum. He is one of those rare writers whose dicta rarely turn out unfounded.

*Gould v. Gould*, '92, P. 240, does not establish or invalidate any principle of law. It shows, however, the curious way in which under the complicated circumstances of modern life people may become connected with various different countries. *D* and *M* his wife are both born in France of parents born in England, but resident in France. They are married in England, but they subsequently reside in France. *D* on coming of age declares his intention to retain his English nationality, and it rather appears that both he and his father intend to return to England when they each should have made a fortune. *D* deserts his wife and leads an unsettled life in New Zealand and the Australian Colonies. *M* petitions for divorce from *D* on the ground of adultery and desertion. The Court holds it has jurisdiction to grant the divorce. The ground of jurisdiction is that *D*'s domicile of origin is English and has never been given up. On the facts of the case the decision is apparently sound, but it is difficult not to feel that there is something arbitrary in the principle which bases the jurisdiction of the Court on the so to speak accidental and irrelevant fact whether *D*'s father did at the time of *D*'s birth contemplate returning to England.

A contributor whose opinion is entitled to great weight asks:—Is the judgment of Hawkins J. in the *Carbolic Smoke Ball case*, '92, 2 Q. B. 484, good law?—and suggests the following objections:—The contract between Mrs. Carlill and the Carbolic Smoke Ball Co., if it existed, may be thus stated. The company makes a general offer to any person that in consideration of his using the smoke ball—not, be it remarked, purchasing it—for a fortnight, the company will, if such person at any time afterwards catches influenza or 'any disease caused by taking cold,' pay him £100 reward; the company, in short, offers a conditional promise to anyone who uses one of the company's smoke balls for a fortnight. The offer is accepted by the performance of the consideration, i.e. by using the smoke ball for a fortnight. Mrs. Carlill, having seen the advertisement, uses the smoke ball for a fortnight. She thereby both accepts the company's offer and performs the consideration for the company's

promise, and thereupon becomes entitled to receive £100, if the judgment of Hawkins J. be right, when she falls ill with the influenza [*quaere*, within what time afterwards? This point is not dealt with: in fact it was some very short time. We must take it that the Court read 'after having used,' &c., as 'within a reasonable time after.'—ED.]. The contract certainly is a very odd one, and the more odd when we notice that ten people might well use the same ball for a fortnight, and thus any one of ten people, of whom not more than one had purchased the ball, would be entitled to receive £100 from the company the first time he caught a cold.

1. The first difficulty is to find the consideration for the company's promise. The use of the smoke ball may, however, be a sufficient consideration.

2. The contract, if it exists, looks uncommonly like a wagering contract. This objection Mr. Justice Hawkins perceives. He meets it by the remark that 'it is essential to a wagering contract that each party may under it either win or lose—whether he win or lose being dependent on the issue of the event, and therefore remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.' Surely this will hardly stand examination. Suppose that *X* says to *A*, 'if you will render me a particular service I will pay you £1 in case a particular horse wins the Derby,' does anyone doubt that this is a wager? [We do doubt it. Suppose the service was training the horse, with an extra payment if he won?—ED.] The truth is that Mr. Justice Hawkins's argument involves him in a dilemma. If *A* renders any consideration to *X* for his promise by the use of the smoke ball, then if *A* does not catch a cold *A* loses the value of his consideration, i.e. he gives it for nothing. If, on the other hand, *A* gives nothing, and loses nothing, by using the smoke ball, *A* gives no consideration for *X*'s promise. The contract which arises in the Smoke Ball case is then either a wagering contract or a contract made without any consideration. In either case it is void.

3. It is essential to the formation of a contract that the promisor should have intended to be legally bound to the promisee to perform his promise, or at any rate that the promisee should from the acts of the promisor have reasonably supposed that the promisor intended to enter into a legal obligation. Can it fairly be deduced from the facts of the Smoke Ball case that such an intention really existed? Was not this a question of fact which at any rate ought to have been left to the jury? The offer being in writing, the question was perhaps wholly one of interpretation for the judge. But even on this view the inference that the company

really meant to enter into a binding contract is a very dubious one. A puff is not a promise. On this point no help can be got from the 'reward cases' such as *Williams v. Carwardine*. When *X* offers to pay *A* £20 if *A* gives information leading to the conviction of *M* for the murder of *N* there can be no doubt that *X* does mean to incur a legal debt to *A* if *A* affords the requisite information.

[We think the Court was justified in being astute to hold the defendants liable: people ought not to be allowed to advertise their wares by means of illusory warranties. As a matter of advertising policy, one would think it would have suited the company better to pay; but that was the company's affair. We agree that the vague terms of the promise give rise to difficulty. Considering the company's statement that 'one carbolic smoke ball will last a family several months,' the offer can hardly be construed as confined to actual buyers, which otherwise it perhaps might have been; and thus Mr. Graham's ingenious argument that the transaction 'amounted to a contract of warranty of prevention of disease with liquidated damages in the event of breach' appears to lose its foundation; for there cannot well be one kind of contract with buyers and another with users who did not buy. But we have no doubt the company was estopped from saying it meant nothing, and on the point of the contract being a wager we think the decision right.—ED.]

All the nice questions of legal casuistry raised by *Read v. Anderson* (1884), 13 Q. B. D. (C. A.) 779, and *Cohen v. Kittell* (1889), 22 Q. B. D. 680, and cases of the like kind, have lost their interest. The Gaming Act, 1892 (55 Vict. c. 9), s. 1, puts an end to the chance of any betting agent ever again recovering or attempting to recover by action at law commission for his services. The only thing to be regretted is that the Gaming Act, 1892, did not once and for all give to the Gaming Act, 1845, 8 & 9 Vict. c. 109, its natural, and probably intended, effect by freeing the Law Courts entirely from the necessity of ever attending to any dispute arising from or connected with a bet. The making of wagers will never cease, but there is no reason why the Courts should not entirely cease to enforce any claim either arising from or connected with a bet. It is at any rate time that the law of wagering should be placed on a clear and intelligible basis. The distinction as to securities between wagers which do, and wagers which do not, fall within the Gaming Act, 1835, 5 & 6 Will. IV, c. 41, should clearly be done away with. No political party in the State is interested in the legal protection of gambling, and there is therefore no apparent reason why either the Government or a private member should not carry a measure giving the fullest effect to the policy of the Gaming Act, 1845.

Questions of wagers and of betting cause hopeless perplexity to magistrates and to judges. *X* is convicted under 36 & 37 Vict. c. 38, s. 3, of the offence in substance of betting and gaming in a public place. The conviction is quashed and *X* escapes punishment because his offence is not described in the information with the minuteness required by the Act. The decision of the Court in *Ridgeway v. Farndale*, '92, 2 Q. B. 309, is, considering the words of the Act, clearly right. Might it not, however, be possible to draw Acts against betting, and the like offences, in language clear and wide enough to make it impossible for a man who has in substance broken the law to escape punishment on account of a merely technical error in the description of his offence?

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*Reg. v. Russell*, '92, 2 Q. B. 312, raises a question which in one form or another has constantly perplexed the Courts. Can *X* be found guilty of larceny when *X* has obtained possession of the goods alleged to be stolen by a trick, but in a certain sense with the assent of *A* their owner; or in other words, what is the precise line which separates larceny from the crime of obtaining goods by false pretences? *X* agrees at a fair to sell a horse to *A*, the prosecutor, for £23, whereof £8 is to be paid to *X* at once and the remainder upon the delivery of the horse. *A* gives £8 to *X*. *X* removes the horse from the fair and never intends to deliver the horse to *A*. *X* is held guilty of larceny. The principle laid down by the Court is that 'if the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, that is larceny.' 'This,' adds Coleridge C.J., 'seems to me not only good law but good sense.' With this sentiment everyone will agree. It is clear that *X* committed a crime. It is satisfactory that he was convicted and punished, but it is not quite so satisfactory that the judges have drawn very subtle distinctions in order to bring under the head of larceny crimes which come more logically under the head of obtaining money or goods by false pretences. The necessity for these subtleties ought not to exist. Why should not the judges be allowed within certain limits to direct a jury, whatever the form of an indictment, to find a cheat guilty of the offence, whatever it is, that he has really committed? or what advantage is there in maintaining elaborate and nice distinctions between different forms of criminal fraud? These questions are easier to ask than to answer. Many years ago Mr. Justice Wright prepared a criminal code for some of the West Indian colonies, which remains in the pigeon-holes of the

Colonial Office. In that draft he boldly proposed to class all forms of fraudulent misappropriation as one substantive offence.

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‘The grave and difficult question in this case [*Hanbury v. Hanbury*, '92, P. 222] is whether insanity is a defence to a suit of this kind [i. e. a divorce suit]. Thus broadly stated, so far as I am aware, it has never been decided in this country, and I do not know whether it ever will be, because there is insanity and insanity.’

These are the words of Sir Charles Butt. They are calculated to excite a good deal of reflection in the minds at any rate of lay readers. Surely either the Legislature or the Courts ought to answer definitely the question whether or not insanity can under any circumstances afford a defence to a petition for divorce. The question is one which may vitally concern every married man or woman. The reason given by the late President of the Divorce Court for an answer being impossible is (we say it with the greatest respect), when carefully examined, futile. No doubt there are, as he intimates, different kinds and degrees of insanity. This may show, and indeed does show, that the law ought to discriminate between different kinds of insanity when determining how far the fact of a husband, for instance, being mad should make it impossible for his wife to obtain a dissolution of their marriage; but it does not show that the grave and difficult question whether insanity is a defence to a petition for divorce ought to be left without an answer. The questions determined in the cases of *Mordaunt v. Moncreiffe* (1874), L. R. 2 Sc. & D. App. 374, and *Baker v. Baker* (1880), 5 P. D. 142, are of course different from the enquiry raised in *Hanbury v. Hanbury*; but anyone who considers the effect of these cases must come to the conclusion that it is high time for the Legislature to determine what is the relation between the insanity of a husband or wife and the right to a divorce.

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*Hearson v. Churchill*, '92, 2 Q. B. (C. A.) 144, determines directly that an engineer officer in the Royal Navy who has accepted a commission and is borne on the books of a shipping commission cannot resign his commission except by permission of the Crown. The case, however, goes in fact a good deal further, and is in substance an authority for the broad proposition that a naval officer is under no circumstances entitled to resign his commission except by permission of the Crown. That this broad proposition, were its truth denied by the Courts, must of necessity be established by Act of Parliament is clear to anyone who recognises the necessity of maintaining a navy and enforcing naval discipline. What is curious, though custom has blinded Englishmen to the strangeness of the

fact, is that a question which goes to the very root of naval discipline should be submitted to the decision of the ordinary Law Courts. Without any special knowledge of German law, we may feel assured that no officer of the German Navy will ever argue before a German Court that he can resign his commission without obtaining the permission of the German Emperor.

*Rolfe v. Thompson*, '92, 2 Q. B. 196, is a decision under the Sale of Food &c. Act, 1879 (42 & 43 Vict. c. 30), s. 3, and determines that when an inspector takes a sample of milk for the purpose of analysis he is not under the words of that section, which enacts that he shall 'submit the same to be analysed,' bound to submit the whole of the sample for analysis. The decision is in one way important. It shows that the Courts are now determined to resist any attempt to whittle down the effect of enactments meant to protect the public from fraud. There is a good deal to be said both for and against the policy of the Statutes whereof the Sale of Food &c. Act, 1879, is a specimen. Few of us now hold that 'adulteration is a form of competition.' Yet the doctrine of *laissez faire*, though for the moment unpopular, contains some wholesome truth. There is nothing, however, to be said for attempts on the part of the Courts to correct the possible errors of the Legislature. It is most desirable that the judges should give full and fair effect to the policy, whatever it be, approved by Parliament. *Rolfe v. Thompson* and *Filshie v. Evington*, '92, 2 Q. B. 200, are proofs that the Courts recognise this truth and will give full effect to the economical policy of Parliament.

Of late years there has been some confusion about the rule in *Shelley's case*. It has been called a rule of construction by persons of high authority (we purposely do not mention names). Therefore it is good to see the true doctrine reasserted in unmistakeable terms by the Court of Appeal: *Evans v. Evans*, '92, 2 Ch. 173. 'Before reference is made to the rule in *Shelley's Case* or *Archer's Case*, or to any rule of law, the first thing is to ascertain the meaning of the words used.' Lindley L.J., p. 184. 'The rule in *Shelley's Case* is no guide to the construction of an instrument; we have to ascertain the construction, and then see whether the rule applies.' Bowen L.J., p. 188. 'The rule in *Shelley's Case*, which is said to be much older than that case, is a rule of law, not a rule of construction.' Kay L.J., *ibid.* The precise point decided is curious, and appears to be new.

The agreement before the Court in *Perls v. Saalfeld*, '92, 2 Ch. 149, C. A., defeated itself by being too ingenious. It was in substance the usual agreement by an employee not to compete with



the employer after leaving his service; but it was so framed as to make the employer the sole judge of what business was in the same line as his, and to require the employer's written permission in every case. 'That really makes him the court of appeal over the clerk,' said Powen L.J. Such a restraint was held to be too wide, and unreasonable. Parties who make agreements of this kind without good advice run great risk of finding their intentions frustrated.

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It was one of the standing jokes with Swift and some of his friends to assume that a certain unfortunate Partridge, an almanac maker, was no longer alive. It was in vain for him to protest, because his protests were treated as coming from the other world: whence the coterie of wits extracted no small amusement. It ceases to be a joke, however, when a newspaper persists in falsely asserting that a trading firm has ceased to exist. This is analogous to slander of title, and for it action lies, but the gist of the action, as was long ago decided, is damage. The question in *Ratcliffe v. Evans* (40 W. R. 578) was whether evidence by the plaintiff that his business had declined after the circulation of the slander was evidence of special damage sufficient to support the action. To this the Court of Appeal, in an elaborate judgment, have said 'Yes.' The law is not unreasonable, and, if showing a general loss of custom is the only way the plaintiff has of proving damage, it will not deny him reparation for the wrong because he does not give the names of particular customers who have dropped off. To do so would be, as Bowen L.J. says, 'the vainest pedantry.' There are several authorities for this—the popular dissenting preacher who was accused of incontinence and whose congregation fell off (*Hartley v. Herring*, 8 T. R. 130, 4 R. R. 614), and the auctioneer (*Hargrave v. Le Breton*, 4 Burr. 2422) whose room emptied after the slander was uttered. The case of the young lady who said she had lost 'several suitors' owing to an imputation on her virtue (*Barnes v. Prudlin*, 1 Sid. 396), was different, for she might have named them: unless indeed they were as numerous as Penelope's.

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Equity, we all know, treats that as done which ought to be done, and following out this principle the late Master of the Rolls, in *Walsh v. Lonsdale* (21 Ch. D. 9), held that a person who was in possession under a lease was in as good (or as bad) a position as if the lease had been granted, but in so deciding Sir G. Jessel ('aliquando dormitat Homerus') was thinking only of a judge of the High Court like himself, with jurisdiction to decree specific performance, not of a County Court judge with no jurisdiction. There

the common law still reigns in primeval simplicity (*Foster v. Reeves*, '92, 2 Q. B. (C. A.) 255), so the luckless landlord could not get his rent, and the tenant went on his way rejoicing. The point, as Lord Esher remarked, is a puzzling one, but that at this time of day we should have one law administered in one Court, and another in another Court, is something worse than a puzzle; it is very like a scandal.

'Executor de son tort' we know pretty well, chiefly as a phrase useful for frightening people who intermeddle with an estate. 'Trustee de son tort' is a phrase of more vague and uncertain import. 'If it be a sin to be fat and merry,' as Falstaff says, 'God help the wicked;' and if it be a breach of trust to help a widow executrix in a friendly way to carry on her late husband's business (albeit not authorised), to look after the accounts and initial cheques drawn by her, there will not be much disinterested kindness of this sort going about in future. In law the distinction is plain: there is no such control over the trust fund as could constitute the alleged trustee de son tort a trustee at all. In morals it is still plainer. Mankind according to Burns is an 'unco squad,' but this is too mild a description for the unconscionable people who bring such an action as *Barney v. Barney* ('92, 2 Ch. 265).

*Griffiths v. Hughes* (76 L. T. R. 760) was an even grosser attempt, fortunately foiled, to make a trustee account for property of the wife which he had advanced to her and her husband, at their request, to pay debts. It was precisely one of those discreditable cases which § 6 of the Trustee Act, 1888, was designed to meet, but the words of the section are 'at the instigation or request or with the consent in writing of the beneficiary.' They include, it is satisfactory to know from *Kekewich J.*, a verbal request. 'Boni judicis est ampliare justitiam.'

Judges are often blamed for not laying down general propositions of law, but the doing so is fraught with danger. For instance in *Cohen v. Mitchell* (25 Q. B. Div. 262) we have the Master of the Rolls laying it down that 'until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value in respect of his after acquired property whether with or without knowledge of the bankruptcy are valid against the trustee.' 'Malignant fate sat by and smiled.' For hardly had the words been uttered before there comes *Re New Land Development Association and Gray* ('92, 2 Ch. (C. A.) 138) a case of real estate, and Court of Appeal, No. 2, is obliged to qualify the proposition by admitting that the doctrine has not

the slightest application to real estate. Probably it will be further qualified before long: for the rationale of the doctrine in *Cohen v. Mitchell* seems to be that suggested by Cave J. in *Ex parte Woodthorpe* (8 Morr. 236), viz. that it relates to cases in which the bankrupt has been carrying on business without interference by the trustee, in other words with his implied sanction. There must be some estoppel of this kind to displace the trustee's title.

Is an infant a person? Precocious infants are often found not only applying for shares but subscribing a company's memorandum. The infant does not mind, for he is safe and can sing in the presence of the liquidator, but if one of the mystic seven should not be a 'person' the consequences to the company are disastrous. It tumbles down like a house of cards according to the Court of Appeal's decision in *Re National Debenture Corporation* ('91, 2 Ch. (C.A.) 505). It is therefore satisfactory to have Vaughan-Williams J. deciding that an infant is a 'person' (*Re Luxon & Co.* No. 2, 40 W. R. 621) affirming Hall V.C.'s view in *Re Nassau Phosphate Co.* (2 Ch. D. 610). The infant's contract as a subscriber is another thing. It is voidable of course, which means valid till rescinded, but however he elects he is still a 'person' and no subsequent repudiation can disincorporate the company. Infant subscribers are not however to be encouraged, for the result might be (though wildly improbable no doubt) that with seven infants subscribing all the share capital, the company's capital would be wholly illusory.

*Tennant v. Smith*, '92, A. C. 150, decides a matter which we should have thought was almost too obvious to require decision, at any rate by the House of Lords, namely that the privilege of occupying a house which the occupier has no right to sublet or use for his profit, is not income, and is not chargeable with income-tax. The case however is remarkable for Lord Halsbury's statement of the principle governing the construction of taxing Acts. It has, he says, 'been referred to in various forms, but I believe they may be all reduced to this—that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.' This principle, which is often overlooked, is important. There is no such thing as the 'spirit' of a taxing Act. Any judge who construes such an Act must look to its words only. He must not include anything which does not come within them, and, we may add, he must not exclude anything which does come within them. A taxing Act is meant to tax.

1840-1892. A contrast. In 1840 one St. George presents a loaded pistol at one Durant, and is on the point of firing it. St. George's finger is on the trigger, when a bystander seizes his hand and prevents his firing. The prisoner is indicted under 1 Vict. c. 85, s. 3, which makes it a crime to 'attempt' to discharge firearms at another person with intent to do him grievous bodily harm, 'by drawing a trigger or in any other manner.' The prisoner is, under the direction of Baron Parke, acquitted. The ground of the acquittal is that he was prevented from pulling the trigger, and therefore did not attempt to discharge a loaded arm 'by drawing a trigger or in any other manner' analogous to drawing a trigger. The puzzled jury add to their verdict, 'we think that he presented the pistol with intent to discharge it, the pistol being loaded,' and clearly fail to appreciate the merit of Parke's subtlety. (See *Reg. v. St. George*, 9 C. & P. 483, 493.) In 1892 one Duckworth follows in the footsteps of St. George. He presents a loaded pistol at his mother, whom he had already threatened to kill. He is on the point of firing, when a bystander seizes his wrists and snatches the pistol from him. Duckworth is indicted for exactly the same offence as was St. George, under an enactment, 24 & 25 Vict. c. 100, s. 18, which, as far as the present point is concerned, repeats the terms of 1 Vict. c. 85, s. 3. Duckworth is convicted and duly sentenced. The attention of the judge is called to *Reg. v. St. George*. A case is stated for the Court. Coleridge C.J. and four other judges unhesitatingly uphold the conviction and overrule *Reg. v. St. George* on this point: *Reg. v. Duckworth*, '92, 2 Q. B. 83. The maxim that penal statutes are to be strictly construed is no longer applied with Parke's logical rigour.

The publication of a mere copy of the contents of a register of County Court judgments which is kept under an Act of Parliament, and which by law the public are entitled to inspect, is privileged.

This is the effect of *Searles v. Scarlett*, '92, 2 Q. B. (C. A.) 56, which satisfactorily carries out the principle established by *Fleming v. Newton* (1848), 1 H. L. C. 363. The unsatisfactory point in the judgment of the Court of Appeal is that it does not lay down the broad rule that facts which under the sanction of the Legislature are recorded for the benefit of the public may always be made public without exposing the man who publishes them to an action for libel. The Court, so far from laying down this principle, seems unwilling to overrule *Williams v. Smith* (1888), 22 Q. B. D. 134; and further intimates an opinion that the publication of facts contained in a public register would not be privileged if the motive for publishing them were in any sense malicious. We do not for a

moment dispute that this may be good law; but we do contend that as a matter of expediency any man ought to be at liberty to publish (assuming he does so accurately) any facts which the Legislature orders to be recorded for the very purpose of their being known to the public. The report of the contents of a public register should stand in the same position as the accurate report of a trial.

*Attorney-General v. Smith*, '92, 2 Q. B. 289, gives some relief to honest executors. *T* dies, leaving pictures of great value. His executors, who probably knew little of art, make a *bona fide* return of the value of the pictures, placing them far below their real worth. Probate duty is duly paid on the value returned by the executors, and the error is not discovered until *T*'s estate has been fully and finally wound up. The Inland Revenue naturally attempt to recover the duty due on the real value of the pictures. The Queen's Bench Division decide that the claim is made too late, for that the executors have ceased to be 'persons acting in the administration of the estate' within the Customs and Inland Revenue Act, 1881, s. 32. The decision certainly is in accordance with justice, and apparently gives fair effect to the words of 44 & 45 Vict. c. 12, s. 32. There is difficulty enough as it is in the position of an executor. It certainly is not the interest of the public that the discharge of an executorship should become so full of peril that it will not be accepted by any honest man. It is satisfactory to find that strict adherence to the literal sense of the words of a statute has for once conduced to the promotion both of justice and of sound policy.

We take the following note from the new (third) edition of Sir F. Pollock's book on the Law of Torts, where it appears as an addendum:—The normal rights of co-owners as to possession and use may be modified by contract. One of them may thus have the exclusive right to possess the chattel, and the other may have temporary possession or custody, as his bailee or servant, without the power of conferring any possessory right on a third person even as to his own share. In *Nyberg v. Handelaar*, '92, 2 Q. B. 202, *A* had sold a half share of a valuable chattel to *B* on the terms that *A* should retain possession until the chattel (a gold enamel box) could be sold for their common benefit. Afterwards *A* let *B* have the box to take it to an auction room. Then *B*, thus having manual possession of the box, delivered it to *Z* by way of pledge for a debt of his own. The Court of Appeal held that *Z* had no defence to an action by *A* to recover the value of his half share. The judgments proceed on the assumption that *B*, while remaining owner in common as to

half the *property*, held the *possession* only as bailee for a special purpose, and his wrongful dealing with it determined the bailment, and revested *A*'s right to immediate possession: see *Fenn v. Bittleston*, 7 Ex. 152, and similar cases cited in text. *Qu.* whether, on the facts, *B* were even a bailee, or were not rather in the position of a servant having bare custody.—The case adds nothing to the settled principles of the Common Law as to possessory rights and remedies, but it affords an interesting and rather novel illustration.

The language of the Employers' Liability Act (which remains unamended notwithstanding many promises) continues to accumulate minute judicial interpretation: *Willets v. Watt & Co.*, '92, 2 Q. B. 92, C. A. Whether the law be substantially just or not, the clumsiness and intricacy of its existing form have made it all but impossible that it should seem just to the persons most concerned with it.

Market gardening is one of the refuges of the British farmer in these days, and it is certainly hard to stop him from growing tomatoes, grapes, and mushrooms, which do pay, instead of wheat and turnips, which do not pay, merely because he has covenanted to cultivate 'according to the best rules of husbandry practised in the neighbourhood' (*Meux v. Cobley*, '92, 2 Ch. 253). Such a covenant is no more than what the law implies from the relation of landlord and tenant, and what the rules to which it refers—the custom of the country—are designed to secure is simply the most beneficial enjoyment of the land compatible with the avoidance of waste. Keeping this in view, the 'best rules' must be construed with reference to the changing circumstances of time and place; in other words, the farmer may grow what he finds the best market for. This is the sense of the thing. No doubt there is such a thing as ameliorative waste by increasing the burden on the land or impairing evidence of title, but market gardening does neither. In *Grand Canal Co. v. M'Namee* (L. R. Ir. 1 Ch. 132) the tenant of a disused hotel had turned it into officers' quarters, putting up wooden partitions in the coffee and billiard rooms and stoves for fireplaces. In dismissing a motion for an injunction Lord Ashbourne pointed true the principle 'Was it a reckless desire to destroy or render the premises useless? No! it was to make the premises of use, in the most beneficial way to the owner.'

It would be better taste for directors of a company not to join in the *saue qui peut* struggle when the ship is sinking, but they do, and hitherto they have done so with marked success, thanks to the unsatisfactory state of the law with regard to their share qualifica-

tions. The cases are numerous and complicated, but they turn as a rule on this, that a duty to qualify is not a contract to qualify. We have now at last, as Lindley L.J. observes, got a form of article which will suffice to fix directors who act without qualification (*Isaacs' Case*, '92, 2 Ch. (C. A.) 158). If the director does not qualify within a month of his appointment he is by this article to be 'deemed to have agreed to take the said shares from the company and the same shall be forthwith allotted to him accordingly.' This turns the duty into a contract, for the director takes office on the terms of the articles. A share qualification is a very efficient, perhaps the best, guarantee for the bona fides of directors, and it ought to be a reality.

By the severe logic of Roman law, children, until the 'senatus consultum Tertullianum,' had no right of succession to their own mother, not being her 'sui heredes.' The Married Women's Property Act does not go so far as to render a wife a stranger to her husband, but it has made her a *feme sole*, and Stirling J. has had to seriously consider whether in doing so it has not disentitled the husband to an estate by the curtesy in her undisposed of realty (*Hope v. Hope*, '92, 2 Ch. 336). If this had been the result of our halting legislation it would not be surprising; nothing now in relation to married women, their property and contracts, could be, for, in Burns' words—

'Common sense has ta'en the road  
And's aff and up the Cowgate  
Fast, fast the day.'

The key to the difficulty is in the term separate property. Separate property has no meaning apart from coverture and ends with it. While the coverture lasts the wife may hold the separate property or sell it or give it away or will it, 'invito marito,' but if she does none of these things, the husband has his chance at last under the old doctrine of unity. 'But Lord,' as Mr. Pepys would say, 'to see what this once flourishing doctrine is come to.'

'This decision, which, strange to say, does not appear to be reported elsewhere, seems to me to be one of great importance upon the law of conversion,' says Collins J., referring to *National Mercantile Bank v. Rymill* (C. A.), 44 L. T. 767: *Consolidated Co. v. Curtis*, '92, 1 Q. B. at p. 501. Subscribers to the Law Reports ought not to be driven to another set of reports for decisions in the Court of Appeal which the judges think of great importance.

In *Elkington & Co. v. Hürter*, '92, 2 Ch. 452, Romer J. took, in our opinion, the sound view. The Courts have gone quite as far as

it is safe to go in the way of treating general terms of promise or expectation as being or including representations or warranties of specific matters of fact. To decide this case otherwise would have been in effect to set up again the now exploded doctrine of 'making representations good' which, about a generation ago, was current in the Courts of certain Vice-Chancellors.

Shortly after *Cochrane v. Moore* was reported, 25 Q. B. Div. 57, it was submitted in this REVIEW (vi. 449) that the Court of Appeal did not mean to lay down that formal manual delivery is needed to perfect a gift of chattels in cases where a real delivery is not practicable, by reason *e.g.* of the donee already having possession or custody. The view so propounded as the result of principle and of the older authorities appears to be confirmed by *Kilpin v. Ratley*, '92, 1 Q. B. 582, which indeed may be said to go a little farther, for the custody of the goods was with the donee's husband.

The Water Companies (Regulation of Powers) Act, 50 & 51 Vict. c. 21, is duly noted in the separate Appendix to Elphinstone and Clark on Searches (p. 117) as adding to the possible terrors of a purchaser within the Metropolis. The case of *East London Waterworks Co. v. Kellerman*, '92, 2 Q. B. 72, shows that the purchaser is personally liable for water-rates in arrear, so that the caution of the learned writers is more than justified.

The important cases of *Companhia de Mocambique* and *De Sousa v. British South Africa Co.*, '92, 2 Q. B. 358, C. A., will be the subject of an article in our next number. At present we will merely say that the judgment delivered by Wright J. appears to have been, at all events, the judgment which a Court of first instance was bound by the existing authorities to give.

That well-worn maxim of both the common and the civil law, *quidquid plantatur solo solo cedit*, has received its latest application at the Antipodes. In the New Zealand case of *Masefield & Rotana* (10 N. Z. L. R. 169) the plaintiff Masefield sold a steam engine and other chattels to one Park, and took from Park a bill of sale by way of mortgage over the same. Park intended to erect the machinery on land he had leased from Himiona (a Maori), but by mistake he put it up on, and affixed it to, land of the defendant Rotana (another Maori), to which he had no title. He did not discover his error until the machinery had been erected and was working. Park became bankrupt, and after his bankruptcy was sent by Masefield to demand possession from Rotana. The astute



aboriginal, however, by this time had made himself aware of the law of fixtures, and refused to deliver up the machinery—alleging in effect that it now formed part of his freehold. And so found Mr. Justice Conolly, and the majority of the Court of Appeal (N. Z.) regretfully adhered to his decision. Mr. Justice Denniston, indeed, in an elaborate dissenting judgment refused to do so, declining to be bound by ‘the rigid and logical application of an ancient maxim, especially when such application admittedly leads to consequences revolting to sense and justice.’ The learned Judge appears to have been much influenced by the American cases, which go far to support his view. Meantime the Maori has triumphed, and the white man is left lamenting the loss of his goods and chattels.

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We regret that we were accidentally prevented from noticing in our last issue the loss of our esteemed correspondent, Dr. K. G. König, for many years legal adviser to the British Legation at Bern. Dr. König’s knowledge of English law and its literature was extraordinary, and few English law-books of importance failed to be noticed by him in the *Centralblatt der Rechtswissenschaft* or elsewhere. As a critic he was both discerning and generous.

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*It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.*

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WANTED—A LAW DICTIONARY<sup>1</sup>.

**A**T our last meeting Mr. Ilbert called attention to the need for an historical edition of the Statutes. I hope the subject will not be allowed to drop, and that some means may be found of giving practical effect to his suggestion. This evening I want to call attention to another missing law-book, which ought, but is not, to be found on our book shelves. We have no such thing as a Law Dictionary, worthy of the name.

Wharton's Law Lexicon is a work of great learning and research—but it is not a dictionary. It is an imperfectly developed encyclopædia. It no doubt explains a great many legal terms, antiquated and modern, but it is mainly devoted to little treatises on various points of law, arranged in alphabetical order. But the true function of a dictionary is to deal with what one may call the nominal, as opposed to the real, value of legal terms. When a term is ambiguous, you want its various meanings to be clearly explained, and illustrated if possible by apt quotations. You do not want to know merely its ordinary meaning or what, in the opinion of the writer, may be its proper meaning, but you require to have pointed out all the senses in which it is used. Take for instance the term 'indorsement.' Primarily it means any writing on the back of a written instrument, but when the term is applied to a bill of exchange it has a triple derivative sense. The custom was for the holder of a bill to write his name on the back, and hand it over to another person, thereby signifying that he transferred the property in the bill, and gave his personal guarantee for its due payment. All those elements were formerly connoted by the term 'indorsement of a bill.' But now it has been held that an indorsement on the face of the bill is as good as an indorsement on the back. It may be an abuse of language to call a writing on the face of a bill an indorsement, but that is not to the point, if in fact the term has been judicially applied to such a writing. Again, you may have an indorsement which transfers the property in a bill, but which contains no guarantee by the indorser that the bill shall be honoured; as for example when a bill is indorsed without recourse. Further, if a person who is not the holder of a bill backs it with his signature, he thereby incurs the liability of an indorser,

<sup>1</sup> Paper read at the Oxford Law Club, 21 May, 1892.

and his signature is commonly called an indorsement, as we have no term corresponding to the French term 'aval.' But such a signature obviously in no way affects the transfer of the instrument. Here then we have one original, and three distinct derivative meanings attached to the term 'indorsement,' that is to say: 1. A writing on the back of a written instrument. 2. A signed writing by the holder of a bill or note transferring the property therein, and guaranteeing the due payment thereof. 3. A signed writing by the holder of a bill or note, transferring the property therein, though not guaranteeing its payment. 4. A signed writing on a bill or note, whether the signer be the holder or not, which guarantees the due payment of the instrument. But I am not aware of any book where a student would find these different meanings discriminated and illustrated. Wharton certainly throws no light on the subject.

I think a dictionary such as I am suggesting should (*inter alia*) collect definitions from standard authors of different periods; and it would be important that citations either from authors or cases should be dated. As law develops and changes, so the meanings of the terms used develop and change. Let me take another illustration from bills of exchange. A bill of exchange in its origin was an instrument by which a merchant who lived in one place, could pay his debt to a creditor who lived in another place without the transmission of cash. It was in fact a device to avoid the necessity of transmitting cash from place to place. The definition given in Comyn's Digest brings this theory out clearly. 'A bill of exchange,' he says, 'is when a man takes money in one country or city upon exchange, and draws a bill whereby he directs another person in another country or city to pay so much to *A* or order for value received of *B* and subscribes it.' The French Code de Commerce, it may be noted, still keeps up the rule of *distantia loci* as it is called, which is embodied in Comyn's definition. It is still part of the French definition of a bill that it should be drawn in one place on another (Code de Commerce, s. 110). But in England the theory and rule of law concerning bills has altered. The banking or currency theory has succeeded to the mercantile theory. A bill now is a substitute for cash, and not merely a means of avoiding the transmission of it. Bills now are simply a flexible paper currency, and in accordance with modern decisions a bill is defined by sect. 3 of the Bills of Exchange Act, 1882, as 'an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a determinable future time, a sum certain in money, to or to the order of a specified person or to bearer.' Turning to sect. 32 of the Stamp Act, 1891, we find a much wider definition of

the term 'bill of exchange' for the purposes of that Act; and this is clearly a fact that a dictionary ought to call attention to. Many legal fallacies arise through the ambiguity of legal terms. An argument founded on one meaning of the term is applied to another meaning. Whether it is expedient for Parliament to appropriate a term with a defined legal or general meaning, and then to proceed to attach another meaning to it, may be an open question. But Parliament undoubtedly has the power to do so, and people require to be put upon their guard, when the power is exercised. It has been said that Parliament can do anything except change a man into a woman or a woman into a man. The Legislature certainly has sailed as near the wind as it can. For instance the Education Act, 1870, has so defined the term 'parent'<sup>1</sup> as to include a maiden aunt. I believe much scandal has from time to time been caused in remote districts by an aged spinster, of irreproachable character, having been summoned by the school attendance officer, as the parent of some truant urchin, who unfortunately was under her care. Clearly a law dictionary ought to take note of legislative definitions. The public should be informed of the pranks played by Parliament with the English language. No book that I know of has hitherto attempted this task. Judicial definitions have to some extent been collected in a very laborious work by Mr. Stroud—namely his Judicial Dictionary, but the scope of his work is strictly limited. It is merely a compilation of judicial dicta on the meaning of words and phrases, and references to such dicta. He does not criticise the definitions he cites, and he has paid much more attention to Equity than to any other branch of the law. There are many, and inconsistent, judicial attempts to define the term 'contract,' but I do not find any of them cited by him. Every lawyer knows that the term 'demurrage' is used in two senses (see per Bowen L.J. in *Clink v. Radford*, 1891, 1 Q. B. at p. 630), but he fails to point this out. Again, I fail to find any of the attempted definitions of 'marine insurance' or 'insurable interest,' or even 'stoppage *in transitu*.'

There is no need, I think, to dilate on the usefulness of a dictionary such as I have proposed. Sir William Anson in his suggestive article entitled 'Some Notes on Terminology in Contract' (LAW QUARTERLY REVIEW, vol. vii, p. 337), has forcibly demonstrated the confusion and ambiguity which characterise English legal terminology, and the practical evils which result therefrom. On this branch of the subject I cannot do better than refer to his article. A dictionary on the lines indicated would be

<sup>1</sup> By sect. 3 of the Act of 1870, the term 'parent' includes guardian, and every person who is liable to maintain, or has the actual custody of any child.

the first step towards improving our legal terminology, and reducing the existing confusion to something like order. It would tend to prune the wild growth of legislative definition, and would be an essential preliminary to that code of the future, which most of us, who have no longer a direct pecuniary interest in the promotion of unnecessary litigation, hope to live to see accomplished.

But assuming the need for a law dictionary, how is it to be compiled? The work would necessarily be expensive. It would require a paid editor who must be a competent lawyer, and he would require paid assistants, though doubtless many of us here to-night, and others as well, would be ready to help as volunteers. The book would necessarily be a large one, and though lawyers would use it freely, they would buy it but scantily. It would be much used in the libraries, but not often found in chambers. I am afraid law publishers would not see sufficient money in it to undertake its publication. But it is just the sort of work that the Clarendon Press or the Inns of Court might well take up on public grounds, and the present moment is a propitious one. The learned gentlemen who, under Sir Frederick Pollock, are preparing the Revised Reports, are going through exactly the course of reading which would be required for a law dictionary. Of course the Revised Reports do not cover the whole field which ought to be examined to make the work complete. But still they cover a large portion of the field, and it is a great pity that the work of the learned editors cannot be utilised for the double purpose.

I venture to ask the Law Club this evening whether, either collectively or individually, we cannot do something to bring the question before the Delegates of the Press or the Inns of Court in order that the present opportunity may not be allowed to slip by. I have added as an appendix to this paper a note on the meanings of the term contract, followed by a rough collection of definitions and illustrative citations. I am not putting forward this note as a specimen article in the proposed dictionary. I merely use it to indicate the materials from which such a dictionary might be compiled.

#### APPENDIX.

*Contract.*—The disposition of the best modern writers appears to be to define 'contract' as an agreement which is enforceable by law. It cannot, I think, be questioned that 'contract' is a species of which 'agreement' is the genus. But having regard to the ordinary language of English lawyers, cases, and statutes, the above definition seems too narrow, for it not only excludes the case of so-called unlawful contracts, but it also excludes the case of agreements

of imperfect obligation—as for instance a verbal agreement to sell goods above the value of £10, which is unenforceable till part performance, or an agreement which does not bear the proper stamp, or an agreement against which the Statute of Limitations may be pleaded. In ordinary legal language as used by careful and accurate writers, all these agreements would be described as contracts. They all have certain legal consequences. They are cognizable, though not enforceable, by law. But to define a ‘contract’ as an agreement intended to be enforceable, and, in fact, cognizable by law, though correct according to ordinary language, appears to be too vague for a scientific definition. Having regard to the existing use of the term, any precise definition must perhaps be more or less arbitrary. It is obvious that the so-called ‘contracts of record’ are not contracts within any legitimate meaning of the term. It is also obvious that the various quasi-contracts which in English law are known as ‘implied contracts’ have no connection with any real agreement. The law merely annexes to certain facts an obligation similar to that which it annexes to certain contracts. But all the various senses in which the term ‘contract’ is used ought to be discriminated and illustrated.

## CITATIONS.

1. ‘A contract is a speech betwixt parties that a thing which is not done be done.’—The Mirror, ch. ii. s. 27.

2. ‘A contract is an agreement upon sufficient consideration to do or not to do a particular thing.’—Blackstone’s Com., Bk. II., ch. 30, § 9, adopted by Kindersley V.C. in *Haynes v. Haynes* (1861), 1 Dr. and Sm., p. 433.

3. ‘A contract or agreement is when a promise is made on one side, and assented to on the other, or when two or more persons enter into an agreement with each other by a promise on either side.’—Stephens’ Com., Bk. II, ch. 5.

4. ‘Contract is a term of uncertain extension. Used loosely it is equivalent to “convention” or “agreement.” Taken in the largest signification which can be given to it correctly, it denotes a convention or agreement which the courts of justice will enforce. That is to say it bears the meaning which was attached to it originally by the Roman jurisconsults.’—Austin’s Jurisprudence, vol. 2, p. 1015.

5. ‘Un contrat est une espèce de convention . . . une convention par laquelle les deux parties, réciproquement, ou seulement l’une des deux, promettent et s’engagent envers l’autre à lui donner quelque chose, ou à faire ou ne pas faire quelque chose.’—Pothier, Traité des Obligations, § 3, adopted in Addison on Contracts.

6. ‘A “contract” is an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.’—Anson on Contracts, Ed. 6, p. 9.

7. 'Every agreement and promise enforceable by law is a *contract*.'—Pollock on Contracts, Ed. 5, p. 2<sup>1</sup>.

8. 'An agreement enforceable by law is a *contract*.'—Indian Contract Act, s. 2<sup>1</sup>.

9. 'A *contract* is an agreement to do or not to do a certain thing. It is essential to the existence of a contract that there should be (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration.'—New York Draft Civil Code, §§ 744-745.

10. 'Le *contrat* est une convention par laquelle une ou plusieurs personnes s'obligent, envers une autre à donner, à faire, ou à ne pas faire quelque chose.'—French Civil Code, Art. 1101.

11. 'Le *contrat* est l'accord de deux ou plusieurs personnes pour former régler ou délier entre elles un lien juridique.'—Italian Civil Code, Art. 1098, translated by Huc.

12. 'Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representations being true, and who do act on it, equity will bind him by such representation treating it as a *contract*.'—Per Lord Cranworth in *Maunsell v. Hedges* (1854), 4 H. of L. Cas. 1039, at p. 1055.

13. 'When both parties will the same thing, and each communicates his will to the other, with a mutual engagement to carry it into effect, then, and not till then, an agreement or *contract* between the two is constituted.'—Per Kindersley V.C. in *Haynes v. Haynes* (1861), 1 Dr. and Sm. 426, c. i. p. 433.

14. 'A *contract* is constituted by the concurrence in intention of two parties, the one promising something to the other, who on his part accepts the promise; it is binding at the time when the two parties separate with that idea in the mind of each; the idea of the one being "I promise," and of the other "I accept." Thus in the Statute of Frauds (s. 17) which provides that "no contract . . . shall be allowed to be good," unless evidenced in a certain way, what has taken place by word of mouth is spoken of as a *contract*. The particular evidence or mode of expression required by the statute to make it enforceable at law is a different matter.'—Per Cleasby B. in *Morrison v. Universal Marine Insurance Company* (1872), L. R. 8 Ex. 40, at p. 60.

15. 'I understand by a *contract* an agreement which the law will enforce, and I apprehend that, speaking generally, the law will enforce all agreements made upon good consideration or with certain solemnities which dispense with consideration. Agreement and consideration are thus the elements which constitute a contract not under seal.'—Per Stephen J. in *Alderson v. Maddison* (1880), 5 Ex. Div. 293, at p. 297.

M. D. CHALMERS.

<sup>1</sup> [In both these cases 'agreement' and 'promise' are also separately defined.—Ed.]

## THE JUDGES' REPORT ON PRACTICE FROM A CHANCERY POINT OF VIEW.

**T**HERE has never been a time when the law has not been abused for its delay and its costliness. Of late years the complaint against it has increased, all the more so because the belief prevailed that by the Judicature Acts the old evils had been swept away and a better state of things introduced. It is certainly strange that with a bench of judges superior to that of any other country in the world, with a bar to which are attracted the keenest intellects in the land, and with a body of solicitors generally respected for the integrity and conscientious ability with which they discharge their very responsible duties, the law which may be said to be the product of these three classes is so much abused, and it must be confessed deservedly abused. Moreover the abuse is beginning to take a very effective form. People are declining to go to law. It is stated that in spite of the increase of population the actual volume of business in the Courts of Justice is decreasing, and that to an extent which cannot be entirely attributed to bad trade.

In these circumstances the report and resolutions of the council of judges recently issued become of very special interest, not only from a political but so far as it affects barristers and solicitors from a pecuniary point of view. '*Interest reipublicae ut finis sit litium.*' It is by no means to the interest of the legal profession that there should be an end to litigation. That is what is apparently coming to pass. As a matter of fact the interests of the public and of lawyers are identical. Whatever tends to make law dilatory and unduly expensive is to the disadvantage equally of the consumers and of the producers. Very keenly then has the report been read by every barrister and solicitor, and it is most desirable that it should be keenly discussed and criticised from every point of view before it becomes crystallised into rules or into an Act of Parliament. The object of these pages is to consider it entirely from the point of view of a Chancery junior under the present system, a position which the learned judges who have sprung from the Chancery ranks have either never occupied or have occupied only for a comparatively short time.

Before discussing the resolutions at which the Judges have arrived it is desirable to consider somewhat the system of practice



which they are intended to reform. This system is contained in 72 orders comprising over 1000 rules besides the appendices and miscellaneous provisions. Among the breakwaters of these more than one thousand rules every action has to be steered. The mere statement of such a fact is enough to discredit the system. Of course not all the rules apply to any one action, but this does not weaken the argument because it is necessary in every action to consider what rules are and what rules are not applicable, sometimes no easy matter.

There are no less than 62 rules relating to the issue and service of writs, without including the special rules relating to partners and firms substituted in June 1891 for the old rules which had proved unworkable for years. There are 28 rules for pleading generally, 9 for statement of claim, 21 for statement of defence and counterclaim, 9 for reply, and 13 additional rules for amendment, or 77 rules in all. These be it observed do not apply to a statement of facts or a special case for which other rules are provided. It might be supposed that pleadings hedged in as they are in this manner would be regarded as of some value. They might indeed be of great value in defining and narrowing the issues and reducing the number of witnesses at the trial, if the parties were uniformly held bound by their pleadings. But the practice has prevailed of late years of looking upon pleadings as mere ornamental discursions, something like the salute before the attack in fencing or the grasp of the hand before the blow in boxing, and parties are told that they knew where the real assault was going to be and ought not to be taken by surprise if it turns out to be very different from what might be gathered from the preliminaries. Thus it has come about that pleadings have lost the greater part of their value. Perhaps the fact that juniors in large practice have really no time to spend on pleadings may have something to do with this result, and perhaps judges who were once juniors in large practice may remember with sympathy how extremely inconvenient it would have been to themselves if they had been held bound to statements for which they scarcely knew that they were responsible until attention was called to them by the other side.

Many of the rules are altogether superfluous, such as r. 3 of Ord. III providing that in the writ 'the indorsement of claim shall be to the effect of such of the forms in App. A as shall be applicable to the case, or if none be found applicable, then such other similarly concise form as the nature of the case may require.' The caution which provides that if the writ is not in a prescribed form it shall be in a different form seems somewhat superabundant. An equal amount of caution better applied would have amended r. 1 of

Ord. II, providing that every action shall be commenced by a writ of summons. An action can now also be commenced by an originating summons. R. 1 of Ord. XIX, 'The following rules of pleading shall be used in the High Court of Justice,' might be omitted without making the slightest difference to the sense. R. 1 of Ord. XXXII, 'Any party to a cause or matter' (qu. ? why not an action) 'may give notice by his pleading or otherwise in writing that he admits the truth of the whole or any part of the case of any other party,' is indisputably correct, but the necessity for embodying platitudes in the Rules of the Supreme Court is not quite obvious.

It may be said that after all no great harm is done by a number of unnecessary rules, and to a certain extent this is true. But the orders abound in superfluous regulations which are undoubtedly incumbrances and obscure the general scheme of practice which they are intended to elucidate. Some most useful if unpretending provisions have positively hidden themselves amid the foliage. Who would expect to come across a rule enabling one master to do the work of another during the illness of the latter in the order relating to the issue of writs? Or who would ever find, except accidentally and when he was looking for something else, a rule respecting the conduct of the sale of trust estates in the order treating of injunctions?

Perhaps it is scarcely fair to complain that there are four different rules for constituting representative parties, seeing that at any rate the rules are all to be found in the same Order (see rr. 8, 9, 32, 46, of Ord. XVI) though they might have been more conveniently placed consecutively. But these are not found to be enough, and further rules on this subject are threatened by the new resolutions.

Superfluity is not the only complaint to be brought against the rules. In the multitude of regulations there is confusion. If, where the writ has been indorsed for an account or involves an account, the proper accounts are to be ordered under r. 1 of Ord. XV unless the defendant satisfies the judge that there is a preliminary question to be tried, why under r. 2 of Ord. XXXIII may the judge at any stage of the proceedings direct any necessary accounts notwithstanding that there is some special issue to be tried? Either the rules are contradictory or the distinction is so infinitesimal as only to lead to confusion and to hamper instead of to assist the judge's discretion. Who can possibly know under which rule to proceed? The plaintiff asks for an account although there is a special issue to be tried, and he is in the right; the defendant resists an account on the ground that there is a preliminary question to be tried, and he is equally in the right.

A somewhat similar confusion arises when the plaintiff seeks to

obtain judgment against the defendant on admissions. If the defendant does not appear to the writ, the plaintiff can move for judgment and set down the action as a short cause. If the defendant appears but makes default in delivering a defence thereby in effect admitting the plaintiff's claim, the plaintiff may set down the action on motion for judgment under r. 11 of Ord. XXVII, and may move for judgment under Ord. XL. This involves setting down the action. If the defendant delivers a defence making actual admissions, the plaintiff under r. 6 of Ord. XXXII may apply to the judge for such judgment as he may be entitled to: in this case the action need not be set down, but if on the motion being made it appears that there must be a discussion or argument it may be ordered to go into the general paper, see the regulation of the Chancery Judges set out at p. 695 of the Annual Practice. Provided there is only one defendant or provided the defendants all adopt the same line of defence, the plaintiff has a chance of applying for judgment under the appropriate order. But if there are several defendants and they are inconsiderate enough to take different courses, the case may arise in which it is to say the least extremely doubtful whether it is possible to obtain judgment against them all in accordance with the rules. Suppose a person entitled to a moiety of real estate brings a partition action against two joint tenants of the other moiety and asks for a sale: both defendants appear to the writ, but only one delivers a statement of defence admitting the plaintiff's title: the defendants refuse to consent to a sale. In this case r. 12 of Ord. XXVII does not permit the action to be set down at once on motion for judgment against the defendant making default in his defence because the action is not severable, but directs it to be set down at the time when it is set down on motion for judgment against the other defendant. According to the regulation of the Chancery Judges referred to above the action is not to be set down against the other defendant. Let not any one venture to say that little difficulties of this sort may be left to the discretion or to the inherent jurisdiction of the judge. Who can say how much jurisdiction is inherent in a judge who is continuously time after time throughout the rules authorised on such and such an application being made to him to make such order as he shall think just? If the application is directed cannot the judge be permitted to make an order thereon without direct authority, or was it apprehended by the learned framers of the rules that the judge's natural inclination would be to make such order as should appear to him unjust?

Perhaps there is only one thing more remarkable than the precision with which the time for taking every step in the action is

fixed by the rules, and that is the regularity with which the provisions in this respect are disregarded. The statement of claim is to be delivered within six weeks, more than enough in nearly all cases; then the defendant has ten days in which to deliver his statement of defence, which is generally too little; three weeks more are allowed for reply, where a week would be ample. However these rules are mere waste paper; the pleadings are never completed in less than months. It is probably *ex abundanti cautela* that r. 7 of Ord. LXIV empowers the judge to enlarge the time appointed by the rules for taking any proceeding, especially as the rule fixing the time commonly adds 'unless the time shall be extended by the judge.'

A good deal might be said about r. 15 of Ord. LVIII, limiting the time for appealing from final and interlocutory orders, and the absolute impossibility of discovering from the rules what is a final and what an interlocutory order. Any attempt however to define the distinction might be beyond the province of the rules, for has not the legislature, with a prescience and a modesty but rarely found in combination, enacted that 'any doubt which may arise' (observe the caution of the expression) 'as to what orders are final and what are interlocutory shall be determined by the Court of Appeal' (Judicature Act 1875, sec. 12)? Some of the doubts which have arisen have been determined in 37 reported cases.

It is indeed no exaggeration to say that many of the rules are intelligible but are not meant to be observed, many are unintelligible but are applicable, many are contradictory and many are superfluous. What plaintiff in his senses, if he knew beforehand that this regiment of rules marshalled under 72 orders was awaiting the issue of his writ, would ever commence an action? The marvel is that so many people do go to law; few indeed are found to taste litigation, like the club sherry in Punch's picture, twice.

So much space has been devoted to criticism of the existing rules because the object of this article is to show that what is wanted is not more rules but fewer, not amplification but simplification of practice. What result then are the resolutions so far as they affect the Chancery Division likely to have? Of course, until the resolutions have been framed into rules or an Act of Parliament, criticism in detail would be for the most part out of place, the general purport of the new proposals is at present the point of interest. The first resolution affecting the Chancery Division, No. 39 in the list, requiring the appointment of another judge, is one upon which no question can possibly arise. For years the Chancery Judges have been unable to dispose of witness actions amid the multitude of their other duties, and another judge to try witness actions cannot

now be refused. Fortunately this resolution can be carried into effect at once. In fact until the new judge has commenced sitting the most important of the other changes cannot be attempted, while the appointment will at once relieve the strain. To what extent it will do so it is not easy to say in the absence of any information as to the number of witness actions tried by the different judges. The Report of the Council gives a list of the numbers of orders made by the Chancery Judges individually for the year 1891, but does not discriminate between those made in the trial of witness actions and those made in other matters. Each of the four judges with chambers devotes Mondays Fridays and Saturdays to special business of a non-witness kind. Tuesdays Wednesdays and Thursdays have to be divided between the trial of witness and the trial of non-witness actions. Assuming then that each of the four judges devotes on an average three days a fortnight to the trial of witness actions, it seems that the fifth judge by giving the whole of every week to this object tries as many witness actions as all the other four put together. Another judge therefore for the trial of witness actions alone ought practically to remove the burden from the shoulders of the four.

This will in some respects be a great improvement, but it sounds better than it is. It will allow the other judges to devote their whole time to non-witness business as is evidently contemplated by resolution 42, and it is certain that they will have sufficient business of this kind to occupy all their time. But so far as witness actions are concerned it seems that the only change will be that the half now tried by four judges will be tried by one judge with the same amount of time in which to try them as the four others now have collectively. Witness actions will be tried more conveniently by two judges by continuous sittings than by one judge by continuous and four judges by intermittent sittings, but they will not be tried any quicker. At present a witness action in the Chancery Division does not come on for trial for more than a year from the date of the issue of writ. What is the cause or what are the causes for this astounding dilatoriness?

The plaintiff is not responsible for it. So far as he is concerned his principal object is to get judgment. With the defendant it may be and often is different. But in an action where no delay is caused by interlocutory applications how much time is really wanted before the parties can be ready for trial? Eight days are reasonably allowed for appearance. If there are no pleadings the action might come on as soon as the witnesses can be got together, say at the expiration of another week. Usually there are pleadings: six weeks will suffice for these, and the parties will be ready for trial

within two months from the commencement of the action. That the action should then at once come on for trial would be the ideal state of things, for every day's delay now becomes to that extent a denial of justice. Now for the reality. After the appearance of the defendant the pleadings are delivered in a leisurely manner it may be extending over three months or more. After the close of the pleadings notice of trial may be given either with the reply or at any time after the issues of fact are ready, rr. 11 and 12 of Ord. XXXVI, and after notice the trial may be entered. In some mysterious manner the entry of the trial, which must be after notice, which must be after the close of the pleadings, may nevertheless take place although the pleadings are not closed, see r. 15 of the same order. Space does not permit the prosecution of the enquiry how this piece of jugglery is effected. Ten days notice of trial must be given under r. 14. Ten days! Ten months would be nearer the mark. Manifestly this gap must be filled somehow or other. The parties themselves thirsting for the fray are not satisfied with absolute inaction: something must be done if only to keep the pot boiling. Hence interrogatories, summonses for further and better answers, summonses for inspection of documents, applications to strike out pleadings, all of which generally do more harm than good. With interrogatories this is especially the case, they inform the defendant of the line which his cross-examination will take, they cause him as a matter of form to perjure himself on paper and then he feels bound for the sake of appearances to perjure himself in the box. It thus happens that the dilatoriness of proceedings and the multitude of provisions contained in the practice rules act and react on one another; the greater the delay the more need of interlocutory applications, the more interlocutory applications the more the time of the judge is wasted on unnecessary points and the greater the delay before the action can be put into the paper for trial. Insure that the action shall come on for trial within two months from the issue of the writ and all intermediate processes vanish as the mist in the presence of the sun. A large part of the judges' work, and that the most unsatisfactory part, would fall to the ground, or rather it would never arise, and the parties would find themselves in Court at the trial of the action with their resources undiminished in purse and person. Abolish delay and the costs may be left to take care of themselves: fail to abolish it and reform will be a mockery.

There is really no reason whatever in the nature of things why most actions should not come on for trial within two months. It is simply a question of an adequate staff of judges with a relentless stamping out of all unnecessary proceedings. A summons in an

action ought to be dismissed as a matter of course with costs unless it is clear that the relief asked by it is of such importance as to justify the expenditure of time and money involved : at present it is encouraged by the practice of making costs costs in the action. This question of delay is the more insisted on because it is apprehended that the proposed reforms will not make any material difference in this respect, at least in the trial of witness actions. Two judges will continuously try these as fast as they can, which as has been pointed out seems to mean as fast as the five judges now try them ; so that the same interval will still remain between the entry for trial and the trial, to be filled up by interlocutory proceedings which of course will come before one of the four judges. And here it may be observed that it is not altogether satisfactory that one judge should be responsible for one half of an action and another judge for the other half, and that the latter should have to be informed of all orders made before the trial commences. Of course in theory judges cannot be expected to remember the orders they have made in any action, but as a matter of fact judges have much better memories than they are credited with. Moreover divided responsibility is always a bad thing. The system of transferring actions to another judge for the purpose of trial only is in fact a makeshift, and like all makeshifts is only better than absolute failure.

It remains to consider the effect of the new resolutions on the non-witness actions motions petitions and chamber work, that is to say on the work left to the four judges. There is little to be said on the subject of Court work, except that the more rapid dispatch of it will be an advantage. The new resolutions principally deal with the work done in chambers which is still further to be increased. This work the report mentions with great satisfaction. 'Originating summonses' it says in par. V, 'although very advantageous to the suitors increase the work of the judges in chambers. The further extension of this mode of proceeding is recommended.' Subsequently the 41st resolution shadows forth a scheme for the amalgamation of Registrars Taxing Masters and Chief Clerks, resulting apparently in the survival of the last named as the fittest.

The report gives no grounds for the satisfaction expressed with respect to the work done in chambers ; it would be interesting to know what those grounds are. That the work is done expeditiously and cheaply may be admitted, that it is satisfactorily done can by no means be unreservedly granted.

It is of course impossible and it was never intended that a matter in chambers should be done with the care and elaboration

with which the same matter would be done in Court: bearing this in mind it is not too much to say in the first place that Ord. LV (see especially r. 2 subs. 1 and 2) throws into chambers a great many cases which can well afford to pay the slightly extra cost of being taken in Court, and which for safety sake ought to pay it. Again questions of construction affecting large sums of money and involving intricate points of law are too often decided in chambers on originating summons under r. 3. This is partly owing to a disinclination on the part of counsel when once they are before the judge to adjourn the matter into Court, thereby wasting the attendance in chambers. It is desirable and could easily be arranged that more summonses should be adjourned immediately into Court.

In the second place, unless counsel are before him, the judge is hardly ever properly instructed in chambers. Solicitors practically never attend summonses themselves for the sufficient reason that they cannot afford to be absent from their offices. The result is that two clerks, perhaps just out of their articles, are sent, in the silence of whose presence the judge has with the assistance of the Chief Clerk to ferret out for himself the facts of the case. A report arose probably from the uneasy consciences of solicitors that one of the new resolutions would require their personal attendance in chambers where counsel were not instructed. Counsel ought to be instructed in every case except the very simplest or poorest, for the purpose of ascertaining what order is really wanted and who are the proper parties, of informing the judge quickly and accurately of the exact point, and of seeing the order through correctly. No doubt this suggestion is open to the retort that it comes from an interested quarter, but it is sufficient to say in reply that the time saved to the judge would from a national point of view alone be well worth the slight extra cost to the individual, without taking into consideration that the orders would be much more correct than is often the case now.

In the third place the judge is called upon to make orders which might well be made by an official of much less cost and importance. Orders appointing new trustees, vesting orders, orders for administration and incidental orders for accounts and inquiries, orders for sale, orders in foreclosure actions, orders in fact which involve a good deal of time and of careful investigation before they can be properly made but which do not involve intricate points of law, might well be made by the judge's substitute. But here it is well to say openly that this substitute cannot be the Chief Clerk. The Chief Clerks as a body are known for the care and ability with which they perform the duties within their powers. In working



out the judge's orders, as in the administration of an estate or on the sale of real property, they are the most efficient persons who could possibly be found. But they cannot be relied upon, and their training as solicitors has not taught them, to decide who are the proper parties to be before the Court or what is the proper form for the order to take. Every barrister must in the course of his career have come across instances where the Chief Clerk, venturing perhaps with a noble ambition beyond the limits assigned to his post, has made orders which could only be looked upon as satisfactory until they were found out. To illustrate what is meant and to avoid the appearance of bringing even so slight a charge as this without evidence, one instance which came to the writer's knowledge shall be given. An order for sale was made by a Chief Clerk in a partition action, the property was sold, the purchaser made no objections, the money was paid into court, and the conveyance executed. The parties to the action then proposed to divide the purchase money, when it was discovered that no inquiry had ever been made nor any affidavit or evidence whatever furnished as to the persons entitled: moreover the parties believed themselves to be entitled under a will involving upon investigation a question of construction according to which it was clear upon the authorities that none of the parties before the Court were entitled to the property.

If the jurisdiction of the judge's substitute is to be enlarged, and the resolutions propose that he shall hear summonses for directions and decide questions of procedure and inspect documents where privilege is claimed (see resolutions 43 and 46), it will be absolutely necessary that he shall have had the training of a barrister as in the Queen's Bench Division. The proposed reforms, hinted at in resolution 41, may be intended to result in the appointment of a Master to draw up orders and decide questions of procedure and perhaps relieve the judge from questions of law where the amount involved is small, and the appointment of a Chief Clerk to carry out the administrative work and to tax costs. It is to be hoped that this will be the result, and that the time is not far distant when, all unnecessary proceedings being strictly prohibited, the judge may be able to devote his whole attention to those questions only which are worthy of it, and so may not only dispose of his non-witness business but also try his own witness actions within the two months which perhaps too despairingly have been spoken of above as the ideal period.

In conclusion a few criticisms may be ventured on points of detail in the resolutions. It is proposed (54) that the judge shall have power to make an order for administration subject to the

supervision of the Court, and the executor will accordingly be required to send in an account with observations (55-58). Surely this is a most ingenuous proposal for cooking your hare before catching him. Is it credible that an executor will be so innocent as to take upon himself the trouble of administration with the certainty that his every dealing with the estate will be allowed or disallowed in the discretion of somebody else? As he is not an officer of the Court and cannot be compelled to pass his accounts like a receiver or a liquidator, he will naturally decline, and throw the whole burden of administration onto the Court. Resolution 61, empowering the judge at any time to convert administration under supervision into administration by the Court, is not likely often to be called into operation.

Another resolution (61, 62) proposes to abolish the right of an executor to retain his own debt in preference to other creditors and to prefer one creditor to another. No sufficient grounds are stated for altering a law which is founded on common sense. It is most unfair to place a man in a position where his duty and his interest conflict, to provide him with the means of paying himself and deny him the right of doing so. Most people would think that when the estate is insolvent the least the executor deserves for his trouble is the privilege he has hitherto enjoyed. As to the other debts the right of the executor to prefer one creditor to another, as it is somewhat invidiously called, is really for the benefit of the creditors, as well as a proper protection to the executor. Who will dare to pay debts at all, if he thereby makes himself personally responsible in the event of the estate afterwards turning out to be insolvent?

Resolution 53 is not quite intelligible. It proposes that Ord. XVI, r. 8 shall be extended so as to apply to foreclosure actions against trustees. The rule requires no extension, it simply provides that trustees may sue or be sued as representing the estate, with power for the judge to require the beneficiaries to be made parties. One of the learned judges has held for reasons which appear to be absolutely conclusive that in foreclosure actions trustees do not sufficiently represent the persons interested in the equity of redemption, and that these latter must be served in order to be foreclosed (see *Francis v. Harrison*, 43 Ch. D. 183). No extension of the rule can alter the law as thus laid down or the reasons for it. It will require an Act of Parliament, which it is to be hoped will not be passed without consideration.

A great deal might be said on the proposal in resolutions 75-77 throwing the costs of orders and inquiries upon the particular fund instead of upon the residuary estate. The extent to which this is

to operate will apparently depend a good deal on the discretion of the judge, but if it is intended to alter the general rule, viz. that the residuary legatees are only to take what is left after the expenses of administration and that the particular legatees are to be paid in preference, it is doubtful whether the new practice will conform to the wishes of testators as nearly as the old.

It need scarcely be said that to treat fully such a subject as this would require more space than is comprised in a single number of this REVIEW. If these few pages appear to contain more of fault-finding than of approval, the justification is easy. It is unnecessary, and it would be presumptuous, to praise the judges' handiwork, to criticise it is both a pleasure and a duty.

H. M. HUMPHRY.

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## OF DOCK WARRANTS, WAREHOUSE-KEEPERS' CERTIFICATES, ETC.

**O**F late, certain firms of warehousemen have obtained private Acts of Parliament enabling them to 'issue transferable certificates and warrants for the delivery of goods,' and later in this paper will be found the material clauses of such an Act which are, I understand, common to all such enactments.

I may, however, begin by pointing out the true nature of warrants and other 'documents of title.'

If *A* lodge his goods with *W*, a warehouseman, they are *A*'s property, and constructively in *A*'s possession, because *W* holds them for him. *A* sells the goods to *B*. They are now *B*'s property, and *B* has the right to take possession. *W* must, after a reasonable time for inquiry, give up possession to *B* if *B* desires it. *B* brings a letter from *A* informing *W* of the sale; that letter would be an authority to *B* to receive possession. It may be that *B* prefers the goods to remain where they are for a time, and if *W* consents to hold them for him he is said to 'attorn' to *B*. The goods are now constructively in the possession of *B*. The property *passed by the sale*.

If *W* is a warehouseman, and keeps the goods of many people, he cannot trust to his memory to tell him who owns any particular parcel of goods. He will make an entry in his books, and will give a receipt to the depositor, indicating the goods by marks, numbers, or description<sup>1</sup>. But very probably the depositor may desire to sell the goods while lying in the warehouse. In order to facilitate dealings with the goods, and to enable himself to act with greater safety, *W* may give the receipt in a form which promises to give possession of the goods, not merely to the depositor, but to any one whom the depositor indicates in a way agreeable to the terms of the receipt<sup>2</sup>.

<sup>1</sup> E.g. Reference number to be quoted on delivery order.  
Not transferable.

<sup>2</sup> Q. 9.

Messrs. A. & Co.

We hold at your disposal in our warehouse subject to conditions as per back  
hereof ex. S.S.

W. & Co.

[This being merely a receipt requires a delivery order.]

<sup>2</sup> E.g. Warrant for entered by endorsement hereon. <b>MARK.</b>	imported in the on the deliverable to <b>NUMBERS.</b>	Capt. from or assigns by <b>WEIGHT,</b>
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The depositor then sells the goods to *B*, and transfers to him the document in the manner indicated in the terms of the receipt. As the document specifies certain goods, the sale is one of specific chattels. The property in these goods passes, and *B* has nothing to do but take possession. This he does by going to *W*, lodging the document with him, taking the goods if he wants them, or if he does not want them getting *W* to 'attorn' to him. When *W* does this, usually either by entry in his books, or by issuing to *B* a new document, the goods are in *B*'s possession. Thus the transfer of the document does not give possession; the importance of the document lies in this, that it is an authority to receive possession. Whether *B* does or does not get possession depends on himself.

It may be that the depositor merely desires to pledge the goods as security for an advance. The observations made upon the contract of sale apply equally here, with this addition, that as at Common Law a pledge depends upon the possession by the pledgee of the goods pledged, it is imperative upon him to take possession, in one of the ways described.

In the case of a sale it is important to take possession for the following reasons. So long as the goods are in the possession of *A*, or are not yet in the possession of *B*, *A* has the vendor's lien, or the right to stop *in transitu*; the goods are in the reputed ownership of *A* for the purposes of bankruptcy, and they are also liable to be sold over again by the vendor.

These documents, then, are concerned only with possession. Whether property has passed, or what property has passed, depends solely on the contract between *A* and *B*, with which *W* has nothing to do. To get possession *B* takes the document properly endorsed, if endorsement is required, to *W*, who thereupon delivers or attorns to him.

But while this procedure was necessary with these documents, a Bill of Lading was differently treated. *A* sells goods which are at sea to *B*, how is *B* to get possession of *his* goods? The captain who has given the receipt, called a Bill of Lading, is at sea, it is alike impossible to take possession of the goods, or to get the captain to attorn. In such a case it was considered that *B* had done all he could do if he got possession of the Bill of Lading properly endorsed. Under these circumstances, possession in fact of the Bill of Lading was held to give *B* possession in law of the goods. It was symbolical delivery. To be quite clear;—*A* puts goods on shipboard, sells them to, and endorses the Bill of Lading to *B*; the transfer of the Bill of Lading divests the vendor's lien, which rests on possession.

*A* has a peculiar right to stop in transit if he hears of *B*'s insol-

veney, and retake possession from *B*, thus reviving the unpaid vendor's lien. But that right of *A* can be defeated by *B* endorsing the Bill of Lading to *C*, who is acting *bona fide* and gives value. The goods by this endorsement to *C*, leave *B*'s possession and are in *C*'s possession.

Simple as this seems, it was not till 1884, when the case of *Sewell v. Burdick* (L. R. 10 Ap. Cas. 74) went to the House of Lords, that it was held that the transfer of a Bill of Lading did not pass the *property* in the goods, and it was Lord Bramwell who pointed out that the property passed by the contract in pursuance of which the Bill of Lading was transferred.

The possession thus of a Bill of Lading was possession of the goods, while possession of other documents of title was not. The vendor's lien, for instance, was not discharged by *A* transferring a dock warrant to *B*, nor by *B* transferring it on to *C*.

Representations were repeatedly made by special juries that in the ordinary practice of merchants transfers of these other documents was understood to pass possession so as to destroy the vendor's lien, and defeat the right of stoppage *in transitu*. Parliament intervened, and passed the Acts known as the Factors Acts.

In the last Act the words 'documents of title' are defined, and include those documents to which I have referred. Section 10 of the Act alters the law. Under it if *A* sells goods to *B*, and lawfully transfers the document of title to *B* in a manner agreeable to the terms of the document, possession still remains in *A* till *W* attorns: but if *B* transfers the document to *C*, who takes it in good faith and for valuable consideration, this last transfer of *B* to *C* defeats the vendor's lien and also the right to stop in transit. The possession of *W* is the possession of *C*. The operation of the second transfer has the same effect as the negotiation of a Bill of Lading has in defeating stoppage *in transitu*.

As the vendor's lien and stoppage *in transitu* are merely rights of the vendor, the statute only gives protection against *A*'s claims. If *A* went bankrupt before *C* got *W* to attorn to him, the goods would probably be in the reputed ownership of *A*.

I now come to those special private Acts mentioned at the beginning of this article. The important clauses are as follows:—

'The said firm may if they think fit from time to time at the request of any person warehousing or depositing goods in or upon any warehouse, wharf, or premises of the said firm, or entitled to any goods so warehoused or deposited, issue and deliver to him a Certificate of such goods having been so warehoused or deposited, or a Warrant for the delivery of such goods or any part thereof to be specified in such warrant.'

'Every such certificate or warrant shall be deemed to be a document of title to the goods specified therein, and shall be transferable by endorsement or special endorsement, and any holder of such certificate or warrant, whether the person named therein or the endorsee thereof, shall have the same right to the possession and property of such goods as if they were deposited in his own warehouse.'

The practice was for the original depositor *A* to endorse the warrant in blank, or for *W* to issue the warrants 'to order,' and for themselves to endorse in blank and hand them over to the depositor. And it was usual to accept these warrants as passing a good title to the holder from hand to hand. Banks took them as security on the assumption that the holder of a warrant endorsed in blank was an 'endorsee thereof.' This assumption was erroneous. If *A* endorses a warrant and hands it to *B*, *B* is endorsee. If *A* endorses it to *B*, *B* is a special endorsee. *B* hands the warrant to *C* without endorsement, *C* is not an endorsee.

While under the Factors Act two transfers of the document were needed to defeat *A*'s rights, here one transfer puts the goods into the possession of *B*, without any necessity for *B* to go to *W* and get his attornment, and so on if *B* endorsed to *C* and *C* to *D*. In case however of an endorsement in blank reaching *D* who had bought from *C*, *D* would have to get *W* to attorn to him.

There was also a notion, inspired by the belief that these warrants had been made 'negotiable instruments,' that a holder for value of one of them had a good, an indefeasible title to the property in the goods. This also was erroneous. He could have no better title than his transferor. *Nemo dat quod non habet*.

And this is so in the case of a Bill of Lading: the endorsee of a Bill of Lading who has paid honestly for the goods, has no title to the goods if his vendor was not the owner.

A. T. CARTER.

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## A DOUBTFUL POINT IN COMMERCIAL LAW.

THIS article deals with the liability of a merchant, where he is not in default, to pay damages to a shipowner for the detention of a ship at the port of discharge by causes over which the merchant has no control. In the last few months in three cases the decisions on this point by Mathew J., Charles J., and Wright J., at Nisi Prius, without a jury, have been reversed by the Court of Appeal. These cases presented no unusual features, the contracts were in common and recognised forms, the causes of delay (strikes and over-crowded berths and warehouses) are of constant occurrence, and it is strange that all three cases were not concluded by authority so that there should be no room for difference of judicial opinion as to the rule of law applicable to the facts. It is a peculiar coincidence that in each of the three cases the learned judge was persuaded to give judgment for the plaintiff shipowners, and in each case wrongly, according to the Court of Appeal.

In charter parties and bills of lading the duty of the merchant to unload the ship at the port of discharge is dealt with in three ways: (1) a certain number of days are allotted, 'The ship to be discharged at such wharf or dock in fourteen like working days<sup>1</sup>;' 'Thirteen running days, Sundays excepted, to be allowed the freighters for sending the cargo alongside and unloading, but in no case should more than seven days be allowed for unloading<sup>2</sup>;' 'The cargo to be unloaded at the average rate of not less than 100 tons per working day<sup>3</sup>;' &c. (2) The contract is entirely silent as to the time allowed for unloading<sup>4</sup>. (3) The contract contains some reference to the custom or practice of the port of discharge: 'The said freighter should be allowed the usual and customary time to unload the said ship at her port of discharge<sup>5</sup>;' 'The cargo to be discharged with all despatch according to the custom of the port<sup>6</sup>;' 'To be discharged at usual fruit berth as fast as steamer can deliver as customary<sup>7</sup>;' 'To be discharged with all despatch as customary<sup>8</sup>;' &c. It will be well to consider each of these

<sup>1</sup> *This v. Byers*, 1876, 1 Q. B. D. 245.

<sup>2</sup> *Budget v. Binnington*, 1890, 25 Q. B. D. 320; '91, 1 Q. B. 32.

<sup>3</sup> *Clink v. Radford*, '92, 1 Q. B. 625.

<sup>4</sup> *Hick v. Rodocanachi*, '92, 2 Q. B. 626.

<sup>5</sup> *Rodgers v. Forrester*, 1810, 2 Camp. 483.

<sup>6</sup> *Postlethwaite v. Freeland*, 1880, 5 Ap. Ca. 599.

<sup>7</sup> *Good v. Isaacs*, '92, 8 T. L. R. 476.

<sup>8</sup> *Castlegate S. S. Company v. Dempsey*, 1892, 1 Q. B. 54 and 8 T. L. R. 523.



classes separately, though the latest decision in the Court of Appeal went on the ground that for the purpose of ascertaining the liability of the merchant for the detention of the ship at the port of discharge, class (2) could not be distinguished from class (3).

(1) Where the parties have in the contract specified a certain number of days for the unloading of the cargo there is little difficulty.

The detention of the ship was caused by the crowded state of the London Docks in *Randall v. Lynch*<sup>1</sup>, by rough weather on the Tees at Middlesbrough in *This v. Byers*<sup>2</sup>, by the delay of other consignees in removing cargo placed above the grain of the defendant in *Porteus v. Watney*<sup>3</sup>, by the strike of the Bristol Dock labourers, in November, 1889, in *Budgett v. Binnington*<sup>4</sup>. In these cases the merchant was held liable to compensate the shipowner for the detention of the ship beyond the specified number of days though he was not in default, and could not have prevented the delay. 'Where the time is thus expressly limited and ascertained by the terms of the contract the merchant will be liable to an action for damages, if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, *for he has engaged that it shall be done*<sup>5</sup>.' The contract, when it is in this form, is that if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, the charterer or the holder of the bill of lading will pay a certain sum for each day beyond those days, however the delay may be caused unless it is by default of the shipowner. In *Budgett v. Binnington*<sup>4</sup> the cargo of grain was being discharged at Bristol according to the custom of the port by the joint action of the shipowners and the consignees, who employed separate stevedores, who in their turn engaged the labourers. After the unloading had proceeded for three days, the labourers employed by both firms of stevedores struck work, and for four days no cargo was discharged. The jury found that in consequence the shipowners were not able and were not ready and willing to perform their part of the discharge. Notwithstanding this finding the Queen's Bench Division gave judgment for the shipowners, and this was affirmed by the Court of Appeal. It was decided that there is no implied condition, precedent to the liability of the merchant, that the shipowner should be able and willing to perform his part of the contract, and that the only defence open to

<sup>1</sup> 1809, 2 Camp. 352.

<sup>2</sup> 1876, 1 Q. B. D. 245.

<sup>3</sup> 1878, 3 Q. B. D. 535.

<sup>4</sup> 1890, 25 Q. B. D. 320; '91, 1 Q. B. 35.

<sup>5</sup> Abbott on Shipping, 5th edition, p. 181, the last edition published in the lifetime of Lord Tenterden. The last words are put in italics by Lord Tenterden.

the merchant is that there were no available means of performing the contract owing to the default of the shipowners. 'The only condition attached is that the lay days shall have commenced and run out. Directly the shipowner shows this state of facts he has proved his case, and it lies on the other side to show, not that there has been no breach of contract, but that he is excused from the performance. In other words, his case is one of confession and avoidance, and the whole burden of proof is upon him<sup>1</sup>.' 'The strike was an unforeseen occurrence, and nobody's fault, and one of those risks which the merchant contracted to bear. I can therefore find no fault in the shipowner or those for whom he is responsible to excuse the breach of contract by the merchants<sup>2</sup>.'

(2) If the contract is silent as to the time allowed to the merchant for unloading the cargo at the port of discharge, the question is, What is the liability which the law imposes by implication?

In *Ford v. Cotesworth*<sup>3</sup> the agreement in the charter party was that the 'said vessel should deliver the said cargo in the usual and customary manner agreeable to bills of lading and so end the voyage,' but there was no stipulation as to time. The delay was caused by the refusal of the authorities at Callao, the port of Lima, to allow the cargo to be landed at the Custom House between April 11 and May 12, 1866, in consequence of the apprehended bombardment of the port by the Spanish fleet. At that time there was war between Spain and Chili, and Peru was involved in the hostilities. Under the direction of Cockburn C.J., the jury found that there had been no unreasonable delay 'either looking to the ordinary state of things at the port or looking to the existing, that is the extraordinary circumstances,' and the defendants, the charterers, had the verdict which they retained in the Court of Queen's Bench and in the Exchequer Chamber. 'We think,' said Blackburn J., 'that the contract which the law implies is only that the merchant and shipowner should each use reasonable despatch in performing his part. If this be so, the delay having happened without fault on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls<sup>4</sup>.' It should be noticed that this decision did not proceed upon the ground that both parties were equally in default, and that neither could complain of the other, but upon the ground that neither party was in default, that is, that the shipowners had no cause of action against the charterers<sup>5</sup>.

In *Wright v. The New Zealand Shipping Company Limited*<sup>6</sup>, the deten-

<sup>1</sup> Per Lord Esher M.R., 1891, 1 Q. B. 38.

<sup>2</sup> Per Lopes L.J., '91, 1 Q. B. 41.

<sup>3</sup> 1868, L. R. 4 Q. B. 127, and 1870, L. R. 5 Q. B. 544.

<sup>4</sup> 1868, L. R. 4 Q. B. at p. 137.

<sup>5</sup> See *Cunningham v. Dunn*, 1878, 3 C. P. D. 443.

<sup>6</sup> 1879, 4 Ex. D. 165 n.

tion of the ship at Port Lyttleton, New Zealand, was caused by the delay of the firm of lightermen employed by the charterers to send lighters alongside the ship. At the time there was a 'rush' of vessels at the port: about twenty were lying there, one half of which either belonged to or were chartered by the defendants, and it was proved at the trial that after the arrival of the vessel, in respect of which the action was brought, the agents of the defendants gave preference as to discharging cargoes to vessels with 'round' charters, that is to vessels chartered for the voyage from a British port and back again. The charter party contained no reference to the time or to the manner of unloading the cargo at Port Lyttleton. At the trial Pollock B. told the jury that they were to take into account the fact that the port was full of vessels, and the charterers had the verdict. The Exchequer Division and the Court of Appeal ordered a new trial on the ground of misdirection, and the charterers paid into court a sum of money which the shipowners accepted in satisfaction of their claim. This decision can be supported only on the ground that the facts showed that the charterers were responsible for the delay, and had brought their difficulties on themselves, and that the case is an illustration of the principle laid down by Lord Ellenborough in *Hill v. Idle*<sup>1</sup>, where the merchant was unable to unload in the usual time because he had shipped a cargo of French wines from Oporto, and he was not allowed to unload them without an order from the Treasury, and a month elapsed before the order was obtained. But the judgments of the Court of Appeal in *Wright v. The New Zealand Shipping Company*<sup>2</sup>, and the reasons there given are at variance with the judgments of Lord Selborne and Lord Blackburn in *Postlethwaite v. Freeland*<sup>3</sup>.

In *Hick v. Rodocanachi*<sup>4</sup> the unloading was delayed by the London Dock strike of 1889. The charterers were protected by the cesser clause in the charter party, and the defendants were consignees of the cargo under a form of bill of lading which contained no reference to the charter party, and no limit of time within which the cargo was to be discharged. At the trial without a jury Mathew J. gave judgment for the shipowners, on the ground that by implication the consignees had undertaken to unload within a reasonable time and had failed to discharge that obligation. The Court of Appeal reversed this decision. In *Wright v. The New Zealand Shipping Company*<sup>2</sup> the judges had implied a contract to unload in a reasonable time judged by ordinary circumstances, and the cases show the existence of two distinct and opposing views, (1) that the time is to be measured by something which may be ascertained more or less

<sup>1</sup> 1815, 4 Camp. 327.

<sup>2</sup> 1879, 4 Ex. D. 165 n.

<sup>3</sup> 1880, 5 Ap. Ca. 599. See pp. 609, 616, and 617.

<sup>4</sup> '91, 2 Q. B. 627.

exactly when the contract is entered into, reasonable time under ordinary circumstances; (2) that the time is to be measured by the actual emergent events, and by the diligence or negligence of the parties concerned under those events, by a measure which cannot be forecast at the time of the contract, but can only be ascertained by the event. Fry L.J. declared that there was a very even balance of authority in favour of each view, and this made the case difficult to decide, but a consideration of two railway cases (*Biddon v. G.N.R. Co.*<sup>1</sup>, where a snow storm delayed a cattle train, and *Taylor v. G.N.R. Co.*<sup>2</sup>, where the delay was owing to the breakdown of a train belonging to another company which had running powers over the defendant's line), in which it had been held that in the absence of any stipulation the obligation of a common carrier must be measured by his diligence or negligence in all the circumstances of the case, tended in favour of the view that reasonable time means reasonable time under all the circumstances of the case.

The decision of the Court of Appeal proceeded on the maxim, 'Lex non cogit ad impossibilia.' 'We have,' said Lindley L.J., 'to do with implied obligations: I am aware of no case in which an obligation to pay damages is ever cast by implication upon a person for not doing that which is rendered impossible by causes beyond his control<sup>3</sup>.'

(3) The third class of cases presents the greatest difficulties, but it is to be hoped that two very recent decisions of the Court of Appeal have cleared the air. The clause containing the reference to the usage or custom of the port as to the discharge of a cargo takes various forms, and strictly a decision as to the meaning of one form is not conclusive authority as to the meaning of another form. An examination of some cases will show how far it is possible to deduce a general rule.

In *Rodgers v. Forrester*<sup>4</sup> the shipowner agreed that 'the freighter should be allowed the usual and customary time to unload the said ship or vessel at her port of discharge.' Owing to the crowded state of the London Docks the ship could not get a berth and deliver her cargo of wines from August 26th to October 20th, 1809. Lord Ellenborough said, 'What is the usual and customary time for a ship to unload a cargo of wines in the port of London? According to the evidence, when the ship gets a berth by rotation, and the wines can be discharged into the bonded warehouse;' and the defendants had the verdict.

In *Postlethwaite v. Freeland*<sup>5</sup> the ship *Cumberland Lassie* was

<sup>1</sup> 1859, 28 L. J. Ex. 57.

<sup>2</sup> 1866, L. R. 1 C. P. 385.

<sup>3</sup> '91, 2 Q. B. p. 638. .

<sup>4</sup> 1810, 2 Camp. 483.

<sup>5</sup> 1879, 4 Ex. D. 155, and 1880, 5 Ap. Ca. 599.

chartered to carry steel rails from Barrow-in-Furness to East London in South Africa, a port situate on a river with a bar at the mouth, there 'to be discharged with all despatch according to the custom of the port.' Ships of the tonnage of the *Cumberland Lassie* are unable to cross the bar until a part of their cargo has been discharged into lighters which are warped over the bar to and from the vessel by an ingenious contrivance described in the judgments in the case. When the *Cumberland Lassie* arrived at East London on August 31, 1875, there were already in the roadstead seven vessels with similar cargoes of steel rails which had the preference in being supplied with lighters. The East London Landing and Shipping Company controlled the warp and owned nine or ten lighters for work in conjunction with the warp; of these only four were suitable to receive the discharge of steel rails, and in consequence a delay of twenty-four days occurred before the unloading of the vessel commenced. The evidence established that the time occupied in discharging the vessel was not greater than the average time occupied in discharging vessels of the like tonnage in the autumn of 1875. At the trial, Lord Coleridge C.J. asked the jury whether in the year 1875, at the port of East London there was any settled practice or custom as to the unloading of sailing vessels laden as the *Cumberland Lassie* was laden. And if so, whether the vessel was unloaded with all despatch according to that custom. The jury answered both questions in the affirmative, and the charterers had the verdict and a new trial was refused by the Exchequer Division, by the majority of the Court of Appeal, and by the House of Lords. In the Court of Appeal, Cotton L.J. adhered to the opinion expressed by him in *Wright v. The New Zealand Shipping Company*<sup>1</sup>, and dissented on the ground that the insufficient number of lighters could not be considered to be a matter regulated by or dependant on the custom or practice of the port, and that in the absence of any express stipulation it was the duty of the charterers to provide appliances of the kind ordinarily in use at the port for the purpose of taking delivery of the cargo. On the other hand, Brett and Thesiger L.JJ. were of opinion that the use of the warp and lighters formed part of the 'custom of the port,' that the charterers did all that they were bound to do, and that they were excused by the custom of the port from doing that which the plaintiffs complained of as an omission. The House of Lords affirmed that decision. 'If an obligation,' said Lord Selborne L.C., 'indefinite as to time is qualified or partially defined by express or implied reference to the custom or the practice of a particular port, every impediment arising from or out of that custom or practice which

<sup>1</sup> 1879, 4 Ex. D. p. 169.

the charterer could not have overcome by the use of any reasonable diligence ought (I think) to be taken into consideration <sup>1</sup>.

In *Good v. Isaacs* <sup>2</sup> the charter party provided that the steamship *Artemis* should load a cargo of oranges in Spain and proceed to Hamburg 'to be discharged at usual fruit berth as fast as steamer can deliver as customary, and when ordered by the charterers.' It is the practice at the port of Hamburg to discharge fruit by means of cranes into a fruit warehouse. The warehouse and the cranes are under the control of government officials, without whose sanction the appliances cannot be used for the discharge of a cargo. The *Artemis* was, with the consent of the officials, moored at a usual fruit berth opposite the fruit warehouse on March 8, 1889, but by reason of the warehouse being full, the discharge did not commence until March 11. It was completed on March 12. Charles J. held that the shipowners were entitled to demurrage, but the Court of Appeal reversed his decision on the ground that the cranes could only be used to unload the oranges according to the custom and regulations of the port when, and if, there was room in the warehouse, to receive the fruit as it was discharged. Lord Herschell founded his judgment on the Scotch case *Wyllie v. Harrison* <sup>3</sup>, where the charter party provided that the cargo was to be discharged 'as fast as the steamer can deliver after having been berthed as customary.' In that case the rule of the port of discharge was that pig iron should not be laid on the quay, but should be discharged into trucks provided by the railway companies. On the arrival of the vessel due notice was given to the railway company by whose lines the cargo was to be forwarded, and the delay was occasioned by the failure of the company to provide the necessary trucks. The Lord President and the other judges of the Court of Session held that the consignees of the pig iron were not liable for demurrage.

The last case is the *Castlegate S. S. Company v. Dempsey* <sup>4</sup>. The *Castlegate* arrived in Garston Dock on November 10, 1890, and commenced unloading on November 14. On November 15, the labourers refused to unload a ship called the *Jessie*, from Barrow, which had been 'blocked' by their Trades Union. The Dock Company locked out the men and brought in strangers; owing to the lock out and the incompetence of the strangers, the unloading of the *Castlegate* was not completed until December 3. The charterers had contracted to discharge the vessel 'with all despatch as customary.' Wright J. found as a fact, that the cargo should,

<sup>1</sup> 5 Ap. Ca. p. 608.

<sup>2</sup> 13 Court of Session Cases, 4th series, p. 92.

<sup>3</sup> '92, 1 Q. B. 54, and on appeal 8 T. L. R. 523.

<sup>4</sup> 1892, 8 T. L. R. 476.

in the absence of a strike, have been discharged in ten days, and he held that the charterers were liable for demurrage. He declined to apply the rule adopted by the Court of Appeal in *Hick v. Rodocanachi*<sup>1</sup>. He said, 'The result of doing so would, in effect, be to give to a charter party which specifies that the unloading is to be "with all despatch as customary," the same meaning as if it contained no such words,' and he distinguished *Postlethwaite v. Freeland*<sup>2</sup> on the ground that there the impediments arose from or out of the custom and position of the port itself, and were not extraneous, such as a strike which in no way arises from or out of the custom of the port. The Court of Appeal reversed this decision. The headnote of the decision is, 'Held that the words "with all despatch as customary" fixed no time for unloading, and that therefore the discharge must be carried out within a reasonable time in the actual circumstances existing at the port.' Mr. Kennedy, Q.C. who argued for the appellants, is reported to have contended that where there was a fixed time for unloading, the charterers took the risk of delay, but not where no fixed time was named for unloading: that there were only these two classes: and that the words 'to be discharged with all despatch as customary' did not refer to time but meant with all despatch, using the customary means of despatch available at the port under the actual circumstances. The Master of the Rolls could not distinguish the case from *Postlethwaite v. Freeland*<sup>2</sup>, and quoted a passage from his own judgment in that case:—'To me this clause "with all despatch according to the custom of the port" seems to mean that the ship was to be discharged with all such despatch as was consistent with the manner and process wherewith every vessel going to that port is discharged<sup>3</sup>.' That is he accepted the argument of the appellants that the clause regulated the manner and not the time of the discharge, and that, there being no other provision applicable to the time of discharge, the rule in *Hick v. Rodocanachi*<sup>1</sup> governed the case.

Mr. Carver in his book on The Law of Carriage by Sea<sup>4</sup>, writes: 'When the time is to be with "usual despatch of the port" or "in the usual and customary time," this is in effect giving a fixed time for the work, namely such a time as would under ordinary conditions be usually occupied at that port,' and he doubts the decision in *Rodgers v. Forrester*<sup>5</sup> on the ground that it makes the phrase 'in the usual and customary time' equivalent to 'in the usual and customary manner.' This passage is in agreement with the judgment of Wright J.<sup>6</sup>, but opposed to that of the Court of Appeal in *Castlegate S.S.*

<sup>1</sup> '91, 2 Q. B. 626.

<sup>4</sup> 1st edition, § 611.

<sup>2</sup> 1880, 5 Ap. Ca. 599.

<sup>5</sup> 1810, 2 Camp. 483.

<sup>3</sup> 1879, 4 Ex. D. p. 164.

<sup>6</sup> '92, 1 Q. B. 54.

*Company v. Dempsey*<sup>1</sup>, for the latter has decided that the word customary refers to the mode and not to the time of unloading. In *Postlethwaite v. Freeland* in the House of Lords, Lord Blackburn said: 'I do not think that this (the clause as to discharging "with all despatch as customary") alters the question, as the express reference to the custom of the port of discharge is no more than what would be implied. For I take it that a charter party in which there are stipulations as to loading or discharging a cargo in a port is always to be construed as made with reference to the custom of the port of loading or discharge as the case may be<sup>2</sup>.' The judgment of Mansfield C.J. in *Burmester v. Hodgson* is precisely to the same effect<sup>3</sup>.

If this be so, the result of the cases is that the merchant either engages by the contract to unload in a certain number of days, or he does not so engage; either he promises absolutely to discharge the vessel in a certain number of days after the voyage has ended, or he promises to use reasonable diligence, under the actual circumstances existing at the time of the discharge. In the absence of express stipulation, in the first case he is, and in the second case he is not, liable to pay damages where he is not in default, for the detention of the ship by causes over which he has no control. In the first case the loss resulting from the detention of the ship by strikes, bad weather, crowded docks, &c., falls on the merchants, in the second case on the shipowners. It would be well if the House of Lords, which has not spoken on this subject since 1880, could speak again with authority, for in commercial law it is of more importance to attain to certainty than to abstract justice. But for the present shipowners may be advised to press for the insertion of definite laydays in charter parties and bills of lading, and merchants should strive to have the time for discharge left vague and uncertain.

ERNEST C. C. FIRTH.

<sup>1</sup> 8 T. L. R. 523.

<sup>2</sup> 1880, 5 Ap. Ca. p. 613.

<sup>3</sup> 1810, 2 Camp. 489.



## MARRIAGE LAW IN MALABAR.

AN interesting attempt is now being made to put on a better footing the family law of the people who follow what is called the Marumakkathayam rule. The chief representatives of the classes subject to this rule are the Nairs, and, as they stand in the social and intellectual scale high among the peoples of Southern India, it is no matter for surprise that, in the place of rules indicating a backward state of civilization, they should seek to establish a system more in accordance with modern ideas. According to ancient custom regulating the lives of about seven hundred thousand persons in Malabar the family is based on the matriarchal system; the line of descent is traced from the common female ancestress, and it is not a man's own children but his sister's sons that may be said to be his heirs. The family or tarwad in a simple form consists of a mother, her brothers and her children, living together in one house. The property of the family, other than that acquired by any individual member by his own exertions, belongs to them jointly, and except by common consent is indivisible. Each member is entitled to be maintained out of the profits of it, but he cannot otherwise deal with any part of it as his own. The management and control of it is vested in the eldest male, who is called the karnavan. Property acquired by an individual is his own to deal with it as he pleases during his life-time, but he cannot dispose of it by will, for on his death it becomes merged in the family property. This state of things makes it probable that the institution of marriage was unknown, and other circumstances in Malabar point in the same direction. In the opinion of the High Court, expressed more than twenty-five years ago and since acted on, the union of the sexes is simply a state of concubinage into which the woman enters of her own choice, being at liberty to change her consort when and as often as she pleases. There is no reason to suppose that the Court will alter this opinion or dignify as a marriage a connection which either party may terminate for any reason or no reason. Nevertheless in point of fact it would be a gross libel on the Nairs to say that public opinion sanctions a system of promiscuous intercourse. Polyandry, if in strictness it can be said ever to have existed among a people ignorant of marriage, has disappeared, and it is said that the free

right of divorce is scarcely ever exercised. As a rule the union lasts for life, and an experienced official is able to say, 'Conjugal fidelity is very general. Nowhere is the marriage tie, albeit informal, more jealously guarded or its neglect more savagely avenged.'

Instead of the husband and wife living apart each in his or her tarwad house, it is becoming common for them to live together in the former's house. Parental affection, for which the law makes no allowance, is exhibiting itself in gifts made by the father to his children. The process of evolution has arrived at such a point that many of the people would be content to leave things as they are, provided only they could acquire by legislation the power of bequeathing by will their separate property. Others, however, are desirous of removing the reproach which is involved in the absence of a marriage law, and of endowing husband and wife with the rights and duties which generally attach to the married state. At present they are of course excluded from the operation of the chapter of law which makes penal such acts as the enticing away a married woman, adultery, and bigamy; and there is a natural anxiety to give a legal sanction to unions which are now of a conventional and precarious nature only. As far as the people are concerned no difficulty would arise, for cohabitation with one woman has come to be the rule and polygamy is of rare occurrence. But before the law can sanction and protect marriage, the conditions of a valid marriage must obviously be determined; some form must be prescribed for adoption by those who wish to put their marriage on a legal footing; and some provision must be made for divorce, since it cannot be supposed that Nairs should adopt the Hindu system in which divorce is unknown. And, further, the question arises how the institution of marriage is to be made to square with the Malabar rules of inheritance. On these points there is great room for diversity of opinion, and the Commissioners to whom the whole matter has recently been referred do not agree in their recommendations.

With regard to the conditions of a legal marriage the proposal which commends itself to the party of reform is to prescribe registration as the only necessary formality, and, while disregarding all caste restrictions, merely to require that the parties should not be related to one another within the fifth degree. This is a bold proposition which, if carried into effect, would be likely to operate far beyond the limits of Malabar. Although religious considerations may have little to do with the conventional marriages of the Nairs, those connections are subject to many caste restrictions. Of these the chief is that a Nair man or woman is forbidden to marry out of the Nair caste; a Nair woman is not even at liberty to take

a husband from an inferior division of the caste. Another curious rule is that which discountenances a woman of North Malabar marrying a man of South Malabar.

These and similar caste restrictions the advocates of the proposal above mentioned would have ignored. Breach of caste rules, they contend, should not be taken to invalidate a marriage evidenced in due form by registration. What the caste would condemn as incestuous intercourse should nevertheless be recognized in law as a valid marriage. It does not require much knowledge of India to understand the opposition which such a proposal as this will excite. Hindus all over India will be quick to see that such a marriage law enacted for Malabar, displacing the caste tribunal and regulating the institution by a few simple statutory rules, would form a dangerously attractive precedent. It is not only in Malabar that sections of society exist among whom a law legalising marriages made in defiance of caste rules would be popular. On the other hand it seems clearly inexpedient to constitute as a statutory condition of a valid marriage the observance of all the rules hitherto associated with the unions which in Malabar have done duty for marriage. Some of these rules which are foolish and vexatious might in course of time, as education progresses, be expected to disappear, and it is most undesirable that the Legislature should do anything calculated to give them vitality. Social opinion will for some time to come suffice to secure a general obedience to them, and there is no reason why the Legislature should throw its weight into the scale and help to stereotype restrictive rules which, having lost any meaning they may ever have had, would but for outside interference ultimately fall into desuetude.

The next question to be considered is that of divorce. Among orthodox Hindus marriage is a sacrament and divorce is an unknown expedient. It is absurd to suppose that the Nairs and those among whom their customs prevail would willingly adopt such a principle, and subject themselves to a law making marriage indissoluble. Some regulated mode of dissolving the tie must be prescribed. Several schemes have been propounded. On the one hand the President of the Commission, the distinguished Brahmin Judge of the Madras High Court, suggests two alternative plans. Reviewing the evidence taken before him he finds a great diversity of opinion as to the causes considered in Marumakkathayam society sufficient to justify divorce, and comes to the conclusion that there is no such general and uniform practice, either as to the causes or as to the form of divorce, as to furnish the elements of a customary law. This being the case, the alternative which presents itself to

his mind is either to declare as just grounds of divorce the causes specified in the Divorce and other cognate Acts, or, leaving matters as they are to the influence of social opinion, merely to impose certain conditions with a view to secure deliberation and prevent hasty action. With this view he would require the party seeking divorce to apply with his karnavan's consent to the Court to serve notice of his intention on the other party, and would also provide that the divorce should not take final effect for a year after the notice. If there is to be a specification of the grounds on which a divorce may take place, he proposes by way of check on the arbitrary exercise of the right of repudiation to exact from the party, seeking a divorce without just cause, a penalty amounting to one fourth of his or her separate property, this quarter share to be held for the benefit of the children, the income only being enjoyed by the innocent parent during his or her life. This scheme of compensation might doubtless serve to discourage unreasonable repudiation among persons possessed of property, but obviously it would not affect the larger class of persons who have not acquired any property of their own, irrespective of that to which they are entitled as members of a tarwad. Whichever of these two plans is to be preferred, the learned Judge is averse to introducing a judicial system of divorce, and would leave it to the parties themselves and their friends to arrange the separation just as they do now. He would make no distinction between the Hindus of Malabar and those of other provinces as to the Courts before which, or the mode in which, matrimonial disputes should be brought for judicial determination. Only he recommends the reference to caste panchayats of questions of conjugal frailty, believing that such tribunals being familiar to the people would be accepted by them as appropriate for the investigation of such matters. The scheme of divorce preferred by those Commissioners, who would fain see caste restrictions ignored and a statutory form of marriage established, follows the lines of the Divorce Acts as well in respect of substantive rules as with regard to machinery. Dissolution of marriage is to be effected only by judicial decree, and only for the reasons on account of which such decree can be given under the Statutes. It is almost enough to say of this scheme that it is most unpopular. A remedy which involves publishing in open Court the secrets of domestic life would be most unwelcome to the respectable classes among Nairs as among other Hindus.

The Commissioners, who desire to adopt Western methods to solve the social difficulties of Malabar, do not seem sufficiently to realize the importance of making their scheme acceptable to the people. It has to be remembered that in all probability for some

time to come the large body of Malayalis would follow their ancient customs and decline to submit themselves to the new law. The Marumakkathayam system cannot be abolished by a stroke of the pen. The difficulties of effecting a transition from this system to one in which marriage is the cardinal institution are great; but surely the best chance of success lies in an endeavour to build up a new system upon the foundations of the old. A marriage law, framed on any other principle and in disregard of popular sentiments, is only too likely to remain a dead letter.

The last point concerns the devolution of property. At present so far as there is any inheritance among Nairs, it is, as has been observed, a man's brothers and his sister's children that count as his heirs. His own children do not form part of his family, and are in no sense his heirs. It is clear that, as soon as the relationship between father and children comes to be recognized, the law of inheritance which ignores that relationship must begin to be undermined. The natural desire on the part of the father to make some provision after his death for the offspring of one who is his *de facto* wife may be satisfied in two ways. It may be enacted that upon the death of a Malayali intestate his self-acquired property shall descend to his wife and children; or the power of testamentary disposition over such property may be granted to him. To the former which is of course the larger provision, the objection is taken that it goes farther than is needed, and would tend to the disruption of the tarwad system. The introduction of a double system of inheritance is deprecated. The answer to such objections is that, whatever reform is preferred, the legislator must not be afraid of anomalies and incongruities. Any scheme which diverts property from the tarwad, which theoretically is the owner of all the property of its members, is inconsistent with the tarwad system. Widows and children can only be provided for at the expense of a tarwad to which in law they are strangers. The difference between making this provision by means of a will and by means of intestate inheritance is rather a difference of degree than of kind.

Nevertheless it may be well to conciliate public opinion by introducing at first the power of testamentary disposition, as to which the Commissioners agree in thinking that it should be declared to be co-extensive with the power to alienate property *inter vivos*. They go further, and think that this power should be granted whether or not marriage is contracted under the Act. If, however, it is desirable to popularise the new marriage law and encourage marriages under it, it would surely be wiser to make the power of testamentary disposition exerciseable only in favour of the offspring

of a statutory marriage. The enlarged power of disposition might act as a premium in favour of the legal as compared with the social marriage. The same observation applies with greater force to any alteration of the law of inheritance. There would be no unfairness in leaving those who prefer to remain under the old dispensation to be governed by the old law, and on the other hand it would not be reasonable to place the children of a mother, who in law is a mere concubine, on the same level with the children of a regularly married wife with regard to their right in their father's property.

As with regard to the relations of the sexes, so with regard to property, the time has come for modifying the archaic system which, though still generally popular, does not fully meet the requirements of modern life. On the one hand there is the family, founded on the paternal relation, coming into competition with the *tarwad* representing the matriarchal system. On the other hand there is the claim for a larger recognition of individual ownership, asserting itself as against the system of family ownership represented by the *tarwad*. The difficulty is that, while the inconveniences of the *tarwad* system are apparent, it still retains a strong hold on the sentiments of the majority of the people who would doubtless strenuously oppose the introduction of partition and other similar incidents of joint property, as it is held under the general Hindu law.

H. H. SHEPHARD.

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## SPECIALLY ENDORSED WRITS.

THE Courts of Law have recently been engaged in judicially settling certain questions arising under Order III. Rule 6 and Order XIV. Rule 1 (R. S. C. 1883). These questions are of little importance to the outside world, but to solicitors who are instructed to issue writs on behalf of private clients and large banking companies they are of no little moment.

Mr. Stringer in an able article in the *Solicitors' Journal* for March 12, 1892, p. 322, shows the gradual development of the process from a decision in *Rodway v. Lucas* under the C. L. Proc. Act 1852, s. 25, the 'fons et origo' of Order III. Rule 6, and concludes his article with a doubt as to what is to fix the rate of interest on a bill of exchange, i.e. whether special contract between the parties or mercantile usage. This point has now been partially discussed in the recent case of *London and Universal Bank v. Clancarty*, where Justice A. L. Smith in the course of judgment says, 'It is clear that the meaning of Section 1 (Bills of Exchange Act 1882, s. 57) is that the amount of the Bill, the interest, and the expenses of noting or protest are all to be recovered as liquidated damages; and further, by Order XXXVI. Rule 58, where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of assessment, that is to say, down to the date of judgment; and if this provision is to be read with Section 57, interest allowed by law, that is, interest down to judgment, is recoverable as liquidated damages.'

The first two above-mentioned Orders under R. S. C. 1883 enable a plaintiff in five cases to specially endorse his writ; these five cases have been divided by the Editors of the *Annual Practice* into two classes—first, the recovery of a debt or liquidated demand; secondly, the recovery of land. It is proposed to deal in this article with money due on a contract expressed or implied.

Clearly then, the total amount claimed on the back of the writ must be a fixed liquidated sum only. No unliquidated damages under 3 & 4 William IV. c. 42. s. 28 will be allowed, e.g. if A's solicitor issues a writ against B for goods sold and delivered, a claim for interest from date of writ till payment or judgment will vitiate the special endorsement.

(*Sheba Gold Mining Company v. Trubshawe*, 36 S. J. 329, '92, 1 Q. B. 674; *Wilks v. Wood*, W. N. 58, 36 S. J. 379, '92, 1 Q. B. 684.)

The prompt working of Order XIV. Rule 1 is thus hindered by *Gurney v. Small* (W. N. 1891, p. 168) which renders amendment impossible after appearance. A new rule is really necessary to enable amendment possible where there is no defence on the merits by giving the Court of Justice or Judge discretionary power to allow a defect in a special endorsement to be removed.

A very simple method of attaining this desirable object would be to add a subsection to Order XIV. Rule 4, giving the Court or Judge discretionary power to remedy any technical defect in the special endorsement and to give judgment for the part of the claim not affected by it.

Such an addition to the Rule named would be in complete harmony with the existing rule, and would enable 'the Court or a Judge' to prevent the machinery of Order XIV. from being thrown out of gear by some trifling technical error in the special endorsement of the writ without in any way interfering with Order III. Rule 6, or Order XIV. Rule 1.

The legal subtleties of the numerous recent decisions are evinced in the cases decided on Bills of Exchange and Promissory Notes. Under the Bills of Exchange Act 1882, section 57, 'Where by this Act interest may be recovered as damages such interest may, if justice require it, be withheld wholly or in part, and where a Bill is expressed to be payable with interest at a given rate interest as damages may or may not be given as interest proper.' There are then three things recoverable, viz. the amount of the Bill, interest, and the expenses of noting or protest; but not (it is to be observed) bank expenses. The ordinary mercantile rate of interest is five per cent., and in an action on a dishonoured Bill the writ may be endorsed with the amount due on the Bill with mercantile interest thereon—*London & Universal Bank v. Clancarty*; *Lawrence & Son v. Willcocks*—also notarial fees, but not banking expenses. Promissory Notes being like Bills of Exchange mercantile securities have always carried interest (see Williams' *Personalty*, 13th Ed. pp. 160, 161) and, as it appears to the writer, subject to the Court's discretion a writ may now be specially endorsed for the amount due on the Bill or Note with interest from the issue of the writ until payment or judgment at the rate specified in the Bill or Note, or if no rate expressed at five per cent., but if the plaintiff claims interest as damages under 3 & 4 William IV. c. 42. s. 28, the special endorsement may be upset (*Lawrence & Sons v. Willcocks*, L. R. '92, 1 Q. B. p. 696; *London & Universal Bank v. Earl of Clancarty*, L. R. '92, 1 Q. B. p. 689). Banking overdrafts which sometimes in the case of country banks are of large amount might, it is thought, be the subject of special endorsement with a claim for interest at the



customary banking rate. The Plaintiff Co. should be prepared to prove the custom by affidavit of other bank managers in case of opposition. As yet there has been no decision on this point.

In connection with the case of *Elliott v. Roberts* must now be read the judgment of Justices Mathew & Smith in the case of *Gold Ores Reduction Co. v. Parr* (W. N. 1892, p. 96) where it was held that as the writ did not show that the interest claimed was payable under an agreement there was not a valid special endorsement, that the fact that the affidavit showed an agreement to pay interest could not make the endorsement good, and therefore that judgment could not be entered under Order XIV.

No doubt the reports will be full of these cases until a new rule as suggested above is passed.

Before concluding these remarks the writer wishes to express his thanks to Mr. F. A. Stringer for many useful suggestions and kind assistance in the preparation of this article, in which these few cases only have been dealt with, because as yet the Judges' decisions have left the other claims under Orders III. and XIV. incomparative clearness. There is no doubt that the summary method given under these Orders requires amendment as before stated, but it is hoped that the Courts of Law will keep a strict hold upon mercantile Shylocks and the rate of interest they may wish to recover and that the 'discretion' given in the Bills of Exchange Act 1882 will be widely exercised.

Moreover it seems desirable to add in conclusion that in the four cases of interest upon debts which have been briefly reviewed in this article, the fine legal distinctions involved render both care and accuracy necessary qualities for solicitors seeking to recover for their clients fixed liquidated demands.

C. L. MATHEWS.

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MASUIRS<sup>1</sup>.

**M**ASUIRS' (mansionarii, mansuarii) was in the Middle Ages one of the many words used to denote the inferior tenantry on an estate. When 'mansus' signified a rustic holding, 'mansuarius' signified the rustic who occupied it. The word was used to represent much the same class as 'hospites,' 'manants,' or our own copyholders; but although it fell into comparative disuse, yet in several parts of Belgium there remained certain people known as 'masuirs' down to a few years ago, the settling of whose rights seems to have given a good deal of trouble to the lawyers of that country.

In the case of the masuirs de Chatelineau, otherwise called 'masuirs de St. Barthélémy,' who exercised certain rights in a wood called 'la Flichée,' M. Errera has found a series of documents relating to their affairs, which he has discussed at length in the book before us. He has also brought forward a number of cases of a similar kind, but not so fully illustrated by documents; and upon these pegs he has hung a learned disquisition on the whole subject.

There is no doubt that he has many of the necessary qualifications for the work, but it is desirable in the interests of English students that we should explain the particular bent of M. Errera's mind. He was led to the study of the subject by the works of M. de Laveleye. His creed is the so-called 'mark' system, and common ownership. When we read that the château de Maele 'rappelle par son nom . . . le mallus, lieu de réunion de l'assemblée judiciaire' (p. 307); when, after a description of an ordinance of the *veldheeren* of the seventeenth century, we read: 'Comment ne pas voir dans cette assemblée du printemps, l'équivalent de l'ancienne réunion des hommes libres au champ de mai' (p. 253), most of our readers will know the colour of M. Errera's spectacles.

M. Errera is also subject to what, if it was not so very common among them, one might call a peculiarity of French lawyers and historians. The feeling with which they regard what they consider the feudal system, the seigneurs, rent-services, villein-services, the cour foncière, and the like, really almost unfits some of them to deal with the subject. It seems as if their ideas were still wholly derived

<sup>1</sup> Les Masuirs. Recherches historiques et juridiques sur quelques vestiges des formes anciennes de la propriété en Belgique. Thèse d'agrégation, présentée à la faculté de droit de l'université de Bruxelles. Par PAUL ERRERA. Bruxelles, 1891. (Thèse), pp. xv and 542; (Preuves), pp. vi and 320.

from the sentiments of the Great Revolution. M. Errera (p. 387) quotes with approval a passage (too long to insert here) from a work of Championnière, a passage which is an excellent illustration of this peculiarity, and for which the only excuse possible is that it was written in 1845. As an instance of the operation of these feelings, we may refer our readers to p. 428. M. Errera finds a number of instances of 'cantonnements,' or what we should call enclosures, operating like our Enclosure Acts of the eighteenth century, at once as enclosures, partitions, and allotments: he sees that these are all expressed to be by consent of the seigneur and commoners; and then he asks the very pertinent and proper question, 'Qui descendra jamais jusque dans l'intimité de ces actes anciens et recherchera la mesure exacte de ce qu'ils avaient de volontaire pour l'une et l'autre partie!' The note of admiration, where in a more historically scientific work we should find a note of interrogation, gently prepares us for the revelation that the discoverer of the secret is our author himself. 'Trop souvent, la forme établissait entre les humbles et les grands une apparente égalité, qui n'effaçait pas la dépendance des uns à l'égard des autres; la si longue résistance que les communautés opposèrent tant de fois aux conventions et aux sentences auxquelles elles avaient concouru, montre les antagonismes profonds que cachaient ces accords.'

The reader must not suppose that M. Errera is what we should call a prejudiced writer, on the contrary, he is a sincere and honest investigator; he so regularly gives us chapter and verse for his statements, that when he fails to do so, as in the passage last quoted, it is obvious that he considers the matter self-evident. The fact is that an education on the Code Napoleon and the Roman law is a positive impediment to the understanding of the feudal law of the Middle Ages. The attempt to explain subinfeudation and tenure in the language of 'la directe,' and 'l'usufruit,' is like trying to fit square pegs into round holes. M. Errera confesses (p. 506) that 'la loi civile ne connaît rien de ce qui touche aux masuirs et aux masuages.'

Now the masuirs as they appear described in the present work will be found extremely interesting to us in England, especially just now, when we are trying to digest, or perhaps to swallow, Mr. Vinogradoff's *Villainage in England*. Under the feudal system, 'mansionarii' are found contrasted with the 'homines feudales' (p. 443); but they appear to owe fealty in 1340 (p. 475, n.). Their principal characteristics are 'morte-main' and heriots (p. 444); they are found paying a relief, 'requisitio terrae,' in 1239, and most often they occur on abbey lands (p. 448). In the year 1201, it is only the tenure that is servile (p. 450), and there are traces of a

sort of sub-holding among them, 'submansionarii' (pp. 461-2). We never find common agriculture among the masuiers, but they occupy small holdings and exercise rights in a wood, pasture, or moor (p. 440).

Now M. Errera's conclusion is that the rights of the masuiers are communal property, that they belong not to individuals, or to a corporation composed of individuals, but collectively to the commune. We prefer to give his conclusion before describing the way by which he arrives at it, because it seems that we shall thus follow more closely the order of his own ideas. The solution of the question depends partly upon the original legal condition of the masuiers, and partly upon the alterations in that condition which have been effected by subsequent transactions and subsequent legislation. The discussion of their original status is one which must always be of the greatest interest to all students of legal history; their subsequent development, so far as due to the natural and gradual modification of legal ideas, is also extremely instructive, but the effect of the deluge described by M. Errera with delightful, if unconscious irony, as 'les lois révolutionnaires dites abolitives de la féodalité' (p. 382), and of later legislative or administrative acts founded upon similar ideas, has been simply destructive. 'Les sociétés se dissolvent aujourd'hui presque toutes, sous la crainte qu'inspire une situation en desharmonie avec nos lois' (p. 231).

And no wonder. Regard the case of the commoners at Donckt. M. Errera transcribes in his *Preuves*, No. xli, two charters of 1253 and 1263 respectively, by which the lord grants to his tenants the right of putting their cattle to pasture in a certain wood. 'Presque telle que nous la décrivent ces deux chartes,' says M. Errera, 'l'administration du Donckt s'est maintenue jusqu'en ces dernières années . . . En 1881 le département des finances émit l'avis que le bien appartenait à la commune, aux termes des articles 1 et 2 de la loi du 10 juin 1793, et l'ancienne direction devait être modifiée' (p. 337).

Probably in the course of time, records illustrating the same principles may be discovered in the archives of the 'Concilium Comitatus Lundon.' but at present Belgium seems to be the most likely place to find them. Very few of the masuiers described in M. Errera's book have escaped confiscation on one quibble or another for the benefit either of the State or the Communes. The operation is amusingly designated by our author as 'leur entrée dans la vie administrative moderne' (p. 510).

In order that the commune may be entitled, it is not enough to show that the enjoyment by the masuiers was enjoyment as by a corporation; it must be shown that their enjoyment was enjoyment

by the commune, for otherwise the commune's claims would be excluded by those of the State, which has succeeded to the possessions of lay corporations (p. 61). Any symptom of united action is liable to be interpreted as corporate activity. And so the poor masuirs are placed as it were between the devil and the deep sea. One wonders what can be the good of *Recherches historiques et juridiques* under such a régime. However, it is a little ungracious to quarrel with a state of things which after all is the occasion of the very interesting work before us.

The question whether the woods and pastures, in or over which the masuirs exercised their rights, can be taken for the commune, is connected with the question whether the masuirs were owners of the soil or whether they were only commoners. In the latter case the commune would not now be considered to have the ownership of the soil. M. Errera therefore argues that the property was not in the lord but in the masuirs, and that the masuirs were in fact the commune.

To an English lawyer, at least, until he has unlearned what he was first taught, the original position of the 'masuirs' and their rights presents no difficulty whatever. If we discard so much of the notion of a copyholder as suggests his holding by copy of court roll (not an impossible supposition when we think of customary freeholds and freehold tenants of a manor), we may say that the masuirs appear from M. Errera's researches to have been copyholders. They held a rustic's holding with common appendant. The rights of common possessed by copyholders in the waste of the manor are certainly rights of property. But they are not ownership of the soil of the waste. Here M. Errera finds a difficulty. How can a man have '*propriété*' in a wood, when the wood is '*propriété*' of the seigneur? In a document of 1479, distributing a wood between the seigneur and the masuirs, M. Errera finds an expression which, with reference to the part assigned to the masuirs, declares that '*ils l'auront héritablement.*' '*C'est la propriété,*' says our author, '*et nul autre droit, qu'on exprime ainsi : encore n'emploie-t-on cette locution, de même que le mot *héritage* et tous ses autres dérivés, que pour désigner la propriété foncière.*' He has other and much better arguments to prove that this document gave to the masuirs in question the ownership of the soil as distinguished from a mere right of common; but this particular argument is strikingly illustrative of the disadvantages under which he labours in trying to understand early feudal documents. Indeed it is very doubtful whether he would allow even a corporeal tenement held by copy to be '*propriété.*' He might say, I understand that he can have '*usufruit*' or '*dominium utile,*' but how can he possibly have '*propriété*'?

These difficulties are not peculiar to French lawyers. The curious reader may perceive the same phenomenon in Craig's *Jus Feudale*, but the Scotchman was familiar with feudal ideas in his own country, and consequently found the difficulty, though serious, not insurmountable, with the help of a '*dominium directum sub modo*' or '*secundum quid*,' and other satisfactory devices.

Now the French applied the terms '*tréfonds*' and '*tréfoncier*' to indicate the seigneur and his property in the soil, and the first chapter (beginning at p. 344) of M. Errera's *Partie Synthétique* is devoted to the explanation of these terms, and is one of the most interesting parts of his work. The '*tréfoncier*' usually claimed a '*cens*,' i. e. a rent or render, reserved upon his grant, as we should say. He could seize for rent in arrear (pp. 370, 449), and the operation was called '*dominicare*' (deminement). He had his court '*cour trefoncière*,' generally composed of a maire and seven échevins named by the seigneur (p. 364), administering '*basse justice*' or '*justice foncière*,' i. e. over the '*hospites*' (p. 365), '*quos alii mansionarios vocant*' (p. 366, n.). In the case of the masuiers we find this court called '*cour des masuiers*' (p. 474), and it was very like our customary court of a manor. It had not '*haute justice*,' this belonged to another court of the lord. The two courts became in time confounded and amalgamated, and we find the higher court, '*cour féodale*,' alone surviving (pp. 104, 475). Amongst M. Errera's *Preuves*, p. 150, No. xxix, there is an admittance of a '*masuir*' at a court by the maire and échevins, closely corresponding with the admittance of an English copyholder. In the fusion of the two courts of the lord, the English reader will at once see an analogy to the fusion of the court baron and the customary court.

If Mr. Vinogradoff is going to persuade us that our own court baron and customary court were originally one and the same court<sup>1</sup>, which in course of time developed into two, and subsequently again merged into one, he will have to show how the same effect was produced in Belgium, or else to explain why the feudal lords in Belgium required two courts from the first, while their analogues in England managed with only one. Without presuming to say that Mr. Vinogradoff is mistaken, it may be thought that his doctrine on this point is rendered by M. Errera's researches a little more difficult to accept.

At the end of the Middle Ages, M. Errera finds that the lords everywhere appointed paid magistrates, who replaced the '*peers*' of former times (p. 473). And he cites a charter of the twelfth

<sup>1</sup> I do not think Mr. Maitland would go quite so far as this (*Select Pleas in Manorial Courts*, pp. xvi-xvii).

century dispensing the masuirs from suit of court on condition that their rent-service, 'cens,' was not in arrear (p. 473).

Now let us follow our author a little further in his investigations. Naturally there was a bond between the tenants of a single estate. They had common interests. But M. Errera admits that this is not far towards 'la vie corporative indépendante, la personnalité juridique' for which he is looking. The seigneur bargains on behalf of the masuirs (pp. 454-5). It is he, and his estate, that constitute the lien between them (p. 440). Their corporate existence begins to dawn in the thirteenth century (p. 457). But if Charles the Bald declared the 'mansi' hereditary in 864 (p. 432), and if, as our author thinks, this was only a recognition of an already existing state of things, this supposed corporate existence looks somewhat imaginary, or at least prehistoric. The point seems to be appreciated by M. Errera, and accordingly we find him in another passage (p. 482) expressing the belief that transmission by 'hoirie' is not so ancient as the institution of masuirs itself. He seems here to have forgotten all about Charles the Bald and his edict of 864.

However this may be, among the numerous cases of masuirs cited by M. Errera, there certainly appear some that have either become, or originally were, the commune of the place. Nothing is more natural. The tenants on the estate are those who enjoy the rights of common; the tenants on the estate are also those who constitute the village commune; it is perhaps easier to run the two characters into one than to keep them distinct in one's mind or in reality.

It is clear that our author is under the impression that there is no alternative theory between that of original and primitive property in the community over these forests, and that of a grant from the lord of rights of common, reserving the ownership of the soil (pp. 436-7). The dilemma, if it really exists, is certainly serious; but it does not exist. Mr. Scrutton has taken the trouble to explain the matter in the *LAW QUARTERLY REVIEW*, vol. iii, p. 373 (Oct. 1887). Mr. Vinogradoff's remarks upon 'recognition' are also in point. If, for whatever reason, all parties agree that their legal relations shall be such as would follow from a grant from the lord, then (unless such an agreement can be rescinded) the legal result is the same as if there had been an actual grant from the lord. And such an agreement may be created by or implied from acquiescence, even after resistance. We are at liberty therefore to consider the legal question, ownership or right of common, unhampered by this dilemma.

Now our author declares that in claiming the ownership, the seigneurs 'se heurtèrent à un sentiment populaire plutôt qu'à un titre' (p. 511). Without going so far as to say that this admission

puts him out of court,—because Englishmen recognise as true laws the unwritten laws of custom,—we may very fairly ask for the evidence that there was any such ‘sentiment populaire’ as is here suggested. There seems on the other hand plenty of evidence against it. The masvirs of Chatelineau for instance clearly had not ownership of the soil down to 1479, and M. Errera admits as much (pp. 60–6). In 1289 we have a clear case of a lord taking money for rights which on the author’s theory did not belong to him (pp. 394–5). The prince-bishop of Liège, seigneur of the wood of Mettet, in 1569 agreed to a division of the wood. The bishop’s ownership is recognised, subject to what we should call common of estovers vested in the commonalty. The commoners have encroached beyond their rights. An agreement is therefore made by which the commonalty are to take a fourth part of the wood in severalty subject to certain restrictions as alienation and waste imposed by the bishop. The property in this one fourth (the ‘domaine utile’ as M. Errera calls it, and possibly at this date, 1569, the word is not so inappropriate) is transferred to the commoners or the commune, and in return the remainder is freed from the rights of common. The transaction is simple and intelligible. But M. Errera, the lawyer, perceives that the restrictions do not square with the correct legal notions of a cantonnement. ‘Ce n’est pas un propriétaire ni un contractant qui parle ainsi,’ says M. Errera; ‘le prince stipule comme souverain . . . et prend une mesure de police forestière’ (p. 397). To such straits is an ingenious man driven by the incompatibility of two systems of law.

It must be admitted that where the right is to cut wood, there would be a good deal to be said for the view that inasmuch as this is the only way of using the wood it shows the exercise of the only rights of ownership which can be exercised, and is therefore evidence of ownership; at all events in cases where there is no evidence in favour of the contrary theory. This argument is duly claimed by M. Errera (pp. 402–3).

Now if we find that the rights of the masvirs in a wood or pasture are proportioned to the size of their holdings, that fact would be a very strong argument in favour of the rights being what we should call ‘appendant’ to their holdings; and as there is no suggestion that each holding was anything but the individual property of the tenant, it would seem to follow that the rights of common equally belonged to individuals, and were not the collective property either of the commune or even of a corporation consisting of the masvirs.

But the force of this argument from an equality of rights of common would be very much diminished if the holdings themselves



were equal. M. Errera asserts that the holdings were in fact equal, and consisted of twelve boniers each. Where he finds the evidence of this we are not told. He admits that so early as the ninth century the holdings had become of various sizes (p. 431). The rights of common, he tells us (p. 462), were limited more by the wants of the family than by the size of the holding, '*comme tous les droits usagers.*' But again he gives no authority for this statement. His theory is ingenious; that originally there was no need to put any restriction on the exercise of these commonable rights, but that when in course of time it became necessary to take measures to preserve the wood or the pasture, the regulations to that end naturally looked to the proportionate sizes of the holdings, and to what we know as '*levancy and couchancy*' (p. 463). But M. Errera, the investigator, admits that regulations based on this principle date from very remote times, possibly from the time of the '*Leges Burgundionum*,' i.e. early in the sixth century. M. Errera, the advocate, replies that at that time the holdings were in fact equal (p. 464). But surely the passage from the Burgundian law implies the contrary. '*Quicumque agrum aut colonicas tenet, secundum terrarum modum vel possessionis suae ratam, sic silvam inter se noverint dividendam.*' Our author concedes that what he calls '*le principe ancien*,' viz. equality of the holdings, did not last till the thirteenth century (p. 464); and under the circumstances this cannot be considered as any great concession on his part.

It seems that in course of time the masuirs of Chatelineau increased in number to such an extent that the wood became insufficient to meet their requirements; and the result was that the poorer set were excluded. At all events in the sixteenth century a regulation was made by which the rights in the wood of Flichée were limited to those masuirs who owned holdings of a certain size (pp. 108-9). In other cases the necessity of limiting the number of commoners led to the adoption of other rules, as for instance a rule by which a certain parentage became a condition of exercising the right of a masuir; and M. Errera ingeniously suggests (p. 482) that this was the way in which hereditary descent came to regulate the transmission. Perhaps; but if hereditary right is no part of the original institution, what becomes of his argument, noticed above, from the use of the word '*héritablement*'?

The history of the masuirs of one locality was by no means the history of the masuirs of another; the different communities seem to have developed independently of each other; they have, if one may say so, fared differently during their lives, and met with sundry kinds of death. There is a real case of masuirs claiming property

in a pasture in 1267: and in 1255 some *amborgers*, which seems to be the Flemish form of masuirs, claimed and were allowed a share in the fines for certain offences; a claim which M. Errera interprets, and probably with justice, to involve ownership (p. 466).

There are many points on which these ancient Belgian institutions present a striking resemblance to what we are acquainted with in England. For instance we find traces of something like the '*mercheta mulierum*' (pp. 481, 483). The lord's right of common together with his tenantry is another point. This gives a great deal of trouble to our author, as it does to Mr. Vinogradoff, though it seems very simple on the theory of the lord's ownership of the soil. Although M. Errera admits that the lord as an institution is an essential and original part of the village arrangement, dating in fact from the first establishment of the Franks; yet the lord's rights of common were in the author's opinion only those of one among many masuirs. The change is due to feudal oppression. If the lord's rights are found to be larger than those of a masuir, then they have been increased by usurpation. Residence on his holding is essential to the exercise by an ordinary masuir of his rights, while the lord is dispensed from this necessity; again the exception is due either to the fact that as representing sovereignty the lord is deemed to be always present, or else to '*le bon plaisir d'un maître que l'on craint.*' From the twelfth century or earlier an abandoned holding reverts to the seigneur; it is '*expropriation.*' After all, what is the good of a theory if it will not do the work it is intended for? But one is inclined to require an explanation of the curious fact that feudal tyranny developed itself in different countries in so strangely similar a manner. The uniformity displayed by it throughout England is perhaps due to the law and the lawyers, as Mr. Vinogradoff has taken pains to explain; but M. Errera does not inform us whether a similar cause operated in his own country. And even if it did, what was there to produce so much similarity between the phenomena appearing in these two countries, to say nothing of others?

Perhaps M. Errera would say that feudal tyranny is the same everywhere. Would it not be worth while to try to find some principle in feudalism itself, feudalism (if one may say so) in the abstract, apart from its modifications in different countries, which would explain the facts upon a principle more likely to work with uniformity than the sporadic selfishness of individuals acting against '*antagonismes profonds*'?

G. H. BLAKESLEY.

## THE EXSHAW CASE.

**A**N action, *Exshaw v. The Prefect of the Gironde*, which was tried last July before the Civil Court of First Instance to test the application of the new French military and nationality laws to British subjects born before they came into operation, has caused a good deal of attention owing to the somewhat wolf-and-the-lamb interpretation put upon these laws by the French government. The difficulties arise out of the following state of the law:

Art. 11 of the Military law of the 15 July, 1889, at present in force in France, provides that

‘Les individus déclarés français en vertu de l’article 1<sup>er</sup> de la loi du 16 décembre 1874, sont portés dans les communes où ils sont domiciliés sur les tableaux de recensement de la classe dont la formation suit l’époque de leur majorité. Ils sont soumis au service militaire s’ils n’établissent pas leur qualité d’étranger.’

This law of 1874 (16 December) declared:—

‘Est Français: tout individu né en France d’un étranger qui lui-même y est né, à moins que dans l’année qui suivra l’époque de sa majorité, telle qu’elle est fixée par la loi française, il ne réclame sa qualité d’étranger par une déclaration faite soit devant l’autorité municipale du lieu de sa résidence, soit devant les agents diplomatiques consulaires de France à l’étranger et qu’il ne justifie avoir conservé sa *nationalité d’origine* par une attestation *en due forme de son gouvernement*, laquelle demeurera annexée à sa déclaration.’

Thus by the most recent law governing the subject, the sons born in France of foreigners themselves also born there, are not called upon to serve in the French army, provided they have complied with certain formalities.

The French government does not however observe the law. The military authorities do not consider themselves bound by the Military law in this particular, but by an earlier one, viz. that of the 26 June, 1889, which says:—

‘Art. 1 et 2.—Sont Français . . . . .

‘3° Tout individu né en France d’un étranger qui lui-même y est né.

‘Art. 16.—Sont abrogées . . . les lois des . . . 16 décembre 1874.’

Parliament, they say, made a mistake in the law of the 15 July. They meant to refer in it to the law of the 26 June, 1889, and not

to that of the 16 December, 1874, which they had just repealed the month before.

They go farther than this, however. The law on nationality of 1889 having declared 'every person born in France of a foreigner who himself was there born' to be French, the French government declares that this law applies to everybody so describable, and that its terms and its intention of making as many soldiers as possible implicitly make it retrospective. Thus a lad born before it came into operation is declared by them to be French irrevocably, though he may have been brought up to his twenty-first year all but one day, and have shaped his life under the belief that he was a foreigner, and had the right of claiming his foreign nationality as soon as he reached maturity.

The difficulty has been further complicated by a judgment of the Court of Cassation (*Hess* case, December 7, 1891), which has decided that the word *étranger* in the law of the 26 June, 1889, includes women.

Thus under the construction of the French military authorities the son born in France of an Englishman is irrevocably French if his father or mother was born in France, and it is of no import to the issue if this son was born before or after the coming into operation of the law of the 26 June, 1889. Nor is it the later law of the 15 July, 1889, but the earlier law of the 26 June that governs his status.

The Exshaw action was brought against the Prefect of the Gironde, representing the State, to test the law in the Law Courts on behalf of the leading British subjects in France who are affected by the change in question.

The plaintiff did not enter into the question arising out of the *Hess* case, his father having been born in France, but contended on the points affecting him that in case of conflict between the provisions of two acts on the same matter, the later in date was applicable on the principle *Lex posterior derogat priori*, a principle without which a legislation would of course be a mockery. He also appealed to art. 2 of the Civil Code which specially provides against laws being enforced retrospectively. It says: 'La loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif.' The plaintiff maintained that he had a certain right under the law of 1874, the right to claim at twenty-one years of age a certain status, that a right is not dependent for its existence on the time having arrived for exercising it, that the terms of the law of 1874 are precise in declaring him a foreigner during his minority, and recognising his right at a specified time to prove he has retained his foreign nationality, and that to forcibly change his status after he had shaped his career accordingly

during the years when the foundations of it are laid was contrary to the law of France as expressed in art. 2 of the Civil Code in the absence of any legislative enactment to the contrary.

The plaintiff, however, rested his case not only on arguments drawn from the general and common law of the land, but also on the special ground that the construction of the Military authorities was contrary to special Treaty rights granted to British subjects by the Anglo-French Convention of the 28 February, 1882.

This Convention, its preamble states, was made

to regulate the commercial and maritime relations of the two countries as well as the status of their subjects.

à régler l'état des relations commerciales et maritimes entre les deux pays, ainsi que l'établissement de leurs nationaux.

It was signed in English and in French. It will be observed that *établissement* is given as the equivalent of status. One of the articles relating to the *établissement* of the subjects of the High Contracting Parties in the two countries is as follows:—

The subjects of the High Contracting Parties shall be exempted from military service, requisitions, and contributions of war, forced loans, advances, and other contributions leviable under exceptional circumstances in so far as these contributions are not imposed on landed property.

Les ressortissants de chacun des deux Etats seront exempts, dans l'autre, de tout service militaire, de toutes réquisitions ou contributions de guerre, des prêts et emprunts et autres contributions extraordinaires qui seraient établis par suite de circonstances exceptionnelles, en tant que ces contributions ne seraient pas imposées sur la propriété foncière.

The French procedure for giving force of law to an International Convention is to adopt it bodily as a special Act of Parliament. This was done on the 13 May, 1882. It was presented to the Chamber of Deputies with the report of the Parliamentary Commission which had examined it. This report, summarising its provisions, stated that '*les autres articles donnent aux nationaux des deux Puissances d'importantes garanties au point de vue du transit, de la navigation, des marques de fabrique, et leur assurent des exemptions spéciales en ce qui touche au service militaire.*'

The plaintiff maintained that if he was a British subject during his minority and had been treated as such by the law of France, he was entitled to the protection of the Convention and was exempt from military service.

He was not born a Frenchman, the law of 1874 having specifically referred to his nationality of origin being foreign, and required a declaration by his government that he had retained this nation-

ality of origin. The word *his* refers to the foreign government. The plaintiff contended that his nationality of origin being British and the law of 1874 being in force when the Convention of 1882 became law in France, he was entitled to claim the exemptions provided therein, and that on the principle well admitted in French law: *Legi speciali per generalem non derogatur*, apart from the fact that the International Convention in itself is binding outside the general law, the General Act of 1889 does not interfere with special enactments relating to a particular class of persons.

The judgment of the Court of First Instance at Bordeaux (July 11, 1892) passes over article 11 of the Military law entirely. It declares, without explanation, that, according to the law of 1874, the plaintiff during his minority was French, and that, therefore, the Convention of 1882 does not apply to him.

It admits that he had a right, but holds that it was not a *droit acquis* (vested right), that it was a mere *expectative* and would only have been a *droit acquis* if the lad had reached his twenty-first year when the law of the 26 June, 1889, came into operation, and could have actually at once exercised it.

It will be interesting to see how the higher Court deals with the questions submitted, not perhaps so much as a matter of law, as this is clear enough, but as a matter showing to what extent Law Courts in France are independent of government, and can be relied upon to apply the law without reference to any consideration but its provisions.

THOMAS BARCLAY.

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## REVIEWS AND NOTICES.

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[Short notices do not necessarily exclude fuller review hereafter.]

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*Handbuch des Handelsrechts.* Von L. GOLDSCHMIDT. Dritte völlig umgearbeitete Auflage. Erster Band: Geschichtlich-literarische Einleitung und die Grundlehren. Erste Abtheilung. Universalgeschichte des Handelsrechts. Erste Lieferung, Stuttgart: Ferdinand Enke. 1891. 8vo. xviii and 468 pp.

THE introduction to the third edition of Geh. Rath Goldschmidt's classical (but unfortunately uncompleted) handbook on mercantile law forms at the same time a separate work on the history of the subject, to be published in two instalments, of which the volume now before us is the first. The author is well known as the foremost living mercantile lawyer both in respect of historical learning and of practical knowledge. As a judge of the Supreme German Mercantile Court (the first Supreme Court of the new German Empire), as one of the most active and influential promoters of mercantile legislation, and as a teacher and author, he has been one of the men whose work has shown that historical learning is a help and not a hindrance to those who are engaged in the solution of important practical problems. The book before us, on the other hand, proves that the monuments of the past are best understood by those who are familiar with the manifestations of the present. Our Law Merchant is now part of the Common Law, but it need hardly be pointed out that at one time it was a separate system, applicable only in respect of dealings between traders, and that even at the end of the last century the opinion that there were special rules of law, applicable to such dealings only, had by no means disappeared. On the continent 'Handelsrecht' ('Droit Commercial') is still a separate body of law, which, notwithstanding local variations, is fairly uniform in its leading characteristics. The object of Geh. Rath Goldschmidt's work is to trace the evolution of this system of legal rules. His researches begin at a very early period and include Eastern and Western countries. Documents relating to mercantile transactions in Assyria, dating back as far as the seventh and sixth century before the Christian era, engraved on tablets in cuneiform character, tell us of mercantile associations, credit and interest transactions, contracts, sureties and mortgages, agency and assignment. As regards Greece, some institutions of Mercantile Law are traceable in Attica. Among these may be mentioned the privileged position of foreign merchants—as distinguished from strangers generally—and the special procedure which, as it seems, was applied to mercantile litigation (*δικαι ἐμπορικαί*). Trade generally was not considered as an occupation worthy of a free citizen, but it was less derogatory to a man's dignity to trade on a large (*ἐμπορία*) than on a small scale (*καπηλεία*). The *τραπεζίτης* performed the functions of a modern banker, and the disgrace attached to trade did not prevent the higher classes from deriving income from 'foenus nauticum.' Roman legal literature does not

throw much light on the origin and development of mercantile law. The logical mind of the classical jurists could not conceive any set of circumstances to which the ordinary rules, modified '*utilitatis causa*,' in cases of hardship, were inapplicable. There were, however, in classical Roman Law a number of legal institutions created for the convenience and by the necessities of commerce. The '*actio exercitoria*' by which the validity of contracts made by agents on behalf of their principals was first recognised, the '*receptum argentarii*' to which Geh. Rath Goldschmidt assigns the place of a modern banker's acceptance, the '*receptum nautarum*,' &c. which imposed special liabilities on certain classes of traders, the '*foenus nauticum*,' which has since been changed into the modern 'bottomry bond' and which then took the place of mercantile insurance, while at the same time performing some of the functions of a bill of exchange, the rules relating to warehouses (*horreae*), &c. are all conspicuous instances. But, as Geh. Rath Goldschmidt points out, the mercantile customs, which were elements in the formation of mercantile law, cannot be adequately ascertained from the *Corpus Juris*. As the etymologist cannot dispense with the study of conversational and provincial Latin, the historian who wishes to trace the influence of Roman law must inquire into provincial and local customs. Law has its dialects like language, and the dialects of Roman law which Geh. Rath Goldschmidt—adopting an expression invented by Professor Brunner—describes by the comprehensive name of '*Vulgarrecht*,' and about which a great deal may be learned from lay writers like Plautus and Livius, as well as from inscriptions and other similar sources, throw much light on the subsequent development of mercantile law. Expressions like '*recipere*,' '*accepere*,' '*permutare*,' '*commendare*' (derived from '*cum mandare*'=*manui dare*), had technical meanings well understood in everyday life but ignored by the jurists. The last-named word describes a transaction which under the name of '*commenda*' has played an important part in mediaeval mercantile life (the modern '*société en commandite*' being one of its developments), but which in legal literature is hidden under the head of '*depositum irregulare*.'

The most noticeable fact after the foundation of the Byzantine Empire is the influence on general commerce which the Arabs acquired. Their contributions to mercantile language and usage (e.g. the following words: '*Admiral*,' '*Magazine*,' '*Average*' [*awâr*=damaged goods], '*Tarif*,' also the use of the Arabic figures), and the universality of their trade (Arab coins are found in countries so distant as Russia and Scandinavia) are pointed out by the author, but he has not as yet been able to discover whether their highly-developed system of law has left any trace in the institutions of the West.

In Germany the progress of trade, and therefore of mercantile law, was very slow. The growth of municipal corporations, which originally were associations for the holding of markets, with their own market law (sometimes called '*Kaufmannsrecht*' [Merchant's law]); the formation of artisans' companies (*Zünfte*) bringing the members of each trade under the protection and control of their fellow-craftsmen; the extension of the ancient Merchant guilds (*Kaufgilden*) and their transformation into powerful organizations for the carrying on of foreign trade (*Hanse Leagues*) are referred to as incidents in that progress. But the insecurity of the sea as well as of the land, the weakness of the Central Authority and the corresponding importance of territorial divisions, obstructed commercial enterprise in all directions. Commerce on a large scale, as carried on under the old Roman Empire, ceased to exist, and Germanic mercantile customs



were, therefore, evolved out of the customs of small tradesmen and artizans. Geh. Rath Goldschmidt points out that for this reason they were slow to incorporate the ideas of Roman law, and that when that incorporation took place, the institutions derived from Germanic sources had become so firmly rooted that they retained a permanent influence on the general body of mercantile law. The author quotes the following instances of the influence of Germanic habits of thought: the distinction between real and personal property, which in the author's opinion is in close connection with the principle of 'Hand muss Hand wahren' and with the mercantile law of pledge and lien; the 'materialisation' of the law of possession; the substitution of the bottomry bond for 'foenus nauticum'; the restrictions of continental mercantile law in respect of actions for breach of warranty, and on the other hand the development of the doctrine of 'merchable goods' (Kaufmannsgut, Marchandise loyale et marchande); the introduction of rules relating to the assessment of damages, &c. The connection of the modern law of negotiable securities with the Germanic law of contract is also referred to and explained.

The countries round the Mediterranean formed the centre of mediaeval commerce, and of these the Italian republics were the most powerful and prosperous. The author's elaborate and extensive researches relating to the legal and mercantile history of these republics have enabled him to supply the readers of his book with a large mass of most valuable and interesting facts. These facts are found in numerous byelaws, statutes, and treaties, in legal documents and books of forms and precedents, notaries' journals, and other records giving a direct insight into mercantile life. The body representing the merchants generally ('mercanzia') and the associations representing particular trades (described by various names, as 'ars, misterium [ministerium], collegium, curia, ordo,' &c.), were organised on the model of the municipal corporations of which they formed the principal constituent elements, and were governed sometimes by one 'consul,' generally by several 'consuls' under the assistance of a small and a large council. The list (matricula) of members, assistants, and apprentices—as pointed out by Geh. Rath Goldschmidt—served as a model for the continental registers of traders (Handelsregister) of the present day. The tribunal of the association did not in any way partake of the character of a modern mercantile court, its chief business being the maintenance of order and discipline among the members and the decision of disputes between them in matters concerning the company (*causa quae ad artem pertinet*—in the case of the general 'mercanzia,' *causa mercantilis*), and the frequent attempts to define these matters, so as to avoid conflicts of jurisdiction with the ordinary tribunals, have in some measure prepared the way for the modern discussions as to the limits of the province of mercantile law, which on the Continent are of great practical importance. A kind of international law was created by the numerous treaties concluded by the Italian Republics with each other and with foreign states. Many of these treaties referred to the settlements of Italian traders (Lombards) in those foreign countries where no regular colonies and dependencies (*logie*) were established, and secured to their 'consules' an extra-territorial jurisdiction which has served as a pattern for the consular jurisdiction of our own days. Interesting particulars are given as to these Lombard settlements which have played so prominent a part in the history of mediaeval finance.

The tribunals of the Italian traders' Companies to which we have referred above differed in character from the 'consulatus maris'—the authorities established by the shipowners' guilds in various Italian, French and Spanish

cities. The 'consulatus maris' of Barcelona is specially referred to by Geh. Rath Goldschmidt on account of its great influence on the development of maritime law. The shipping guild of that city, 'Commune riparie Barchinonae,' existed in the middle of the thirteenth century, and seems at that time to have had a concurrent jurisdiction with the royal authorities, but it was gradually merged with the municipal corporation to whom in 1347 the privilege was granted to appoint a judicial and administrative board: 'consules maris et judicem eorum.' The Judgments and Regulations of this Board are the foundation of the 'Costumes de la mer' which have been published in several collections and translations, and form an essential part of modern maritime law. The maritime tribunal of the island of Oléron has had a similar influence.

Much attention is given to the mercantile history of France, and more especially to the fairs of the Champagne and Lyons which seem to have been meeting-places for the traders of the whole of Europe, being convenient centres not only for the buying and selling of goods, but also for the collection and discharge of debts, for which latter purpose a regular clearing-house system seems to have been established.

Having thus described the mercantile life of the various Continental nations, Geh. Rath Goldschmidt proceeds to trace the history of the individual institutions of mercantile law. The *commenda*, a favourite form of investment for the mediaeval capitalist, has already been referred to; the modern partnership (the mediaeval name for which was '*compagnia*,' has a much humbler beginning, having originally served as a form of association for poor artisans who wished to establish a community similar to a joint household ('*cum panis*'—the analogy with *οἰστροφία* is pointed out by the author). In a similar way the other institutions of Mercantile law are traced to their beginnings, one of the most interesting parts of this division of the book being the one dealing with Bills of Exchange. The author shows how they were created by the necessities of the transmission of money from place to place (a transaction known to the Roman '*Vulgarrecht*' under the name of '*permutatio*'), how they originally consisted of two documents—a promissory note by which the maker bound himself to pay in a foreign, and an order to pay addressed to the maker's foreign agent, and how their modern form was evolved.

The enumeration of subjects given in this notice, though very incomplete, will be sufficient to give an idea of the wealth of material presented to me by Geh. Rath Goldschmidt as well as of its varied and interesting character.

We hope that the book will find many readers both inside and outside the legal profession. E. S.

[The Arabic derivation of 'average' is considered and rejected by Dr. Murray in the Oxford English Dictionary *s.v.*—ED.]

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*The Old English Manor: a Study in English Economic History.* By CHARLES McLEAN ANDREWS. Baltimore: The Johns Hopkins Press. 1892. La. 8vo. xii (one blank) and 291 pp.

DR. ANDREWS of the Johns Hopkins University has done an opportune and useful piece of work in collecting and digesting the present sum of our knowledge as to the Anglo-Saxon origins of the manorial system which prevailed in England through the Middle Ages. This is a study which, as our readers need not be told, offers at every turn difficult and mixed

problems of economic, political, and legal history. For several reasons, among which we must count with regret the complete indifference of most English lawyers to the history of our own institutions, the progress of research has been rather one-sided for the last ten or twelve years, and the economists have perhaps had things a little too much their own way. Whereas our law-books used to treat the judicial aspect of the manor as if it were the only one that called for attention, or did not, even for lawyers, require to be elucidated by reference to the working economy of the rural community, some ingenious writers have lately gone into the other extreme, so that an inquiring stranger might without any great negligence peruse their works and fail to discover that the manor had any definite standing among legal institutions. Mr. Vinogradoff has done much to show the way to due and equitable recognition of both elements; and Mr. Andrews, though he professes to be in the first place a historian of social economy, has now achieved considerable success in holding the balance even between the formal and the practical view of the subject. His book will be profitable to students of legal as well as of economical development.

We likewise find here—perhaps for the first time in an English book—a deliberate judgment on the state of the ‘village community’ question in the light of such recent examinations of the facts as have been made by Mr. Seebohm and Mr. Vinogradoff, and (on more or less similar ground, though not with specific reference to England) by Fustel de Coulanges. Dr. Andrews may be claimed, I think, as a supporter of the opinion which has been more than once expressed in this REVIEW. He is not by any means persuaded that the time is come to throw away Kemble and Von Maurer; he is willing to learn from all quarters, but in the main he goes with Mr. Vinogradoff and Mr. Kovalevsky rather than with Fustel de Coulanges and Mr. Seebohm. Certain exaggerations, due to the following of the masters without sufficient first-hand work and verification, have doubtless been rightly checked. The Teutonic village community can no longer be taken as a political model for English or German citizens of a constitutional monarchy, or for the republican English of America. We must believe that it was much more of a clan than we were taught some twenty years ago, and we may not believe that the commanding position of lords and chieftains was due to backsliding from primeval equality. But this, as I have pointed out myself, is really what Caesar and Tacitus have been telling us from the first, if we are content to take their words as they stand. It by no means follows that everybody who was not a lord was a slave or the next thing to a slave, or that the agricultural peculiarities of the common-field system have to do with the servile condition of the occupiers. Modern Germans have probably read more meanings into ‘*folc*’ and its compounds than ever they had in living Anglo-Saxon; for example, I believe the ‘*folk-peace*’ which has crept into one or two English textbooks to be wholly imaginary. But it does not follow that an Anglo-Saxon king was despotic in his kingdom, or that a lord’s power within his own bounds was not effectively tempered in many things by custom. Not that an effective custom, in a society where there is little writing, not much sense of dates, and no tyranny of caste or priestly tribe, must needs be ancient. The fertility and flexibility of secular and even religious customs, in favourable conditions, has perhaps never been adequately allowed for. Something, I think, is to be learnt from schoolboys in this matter, as witness another Johns Hopkins publication on the rudimentary society of a school in Maryland, noticed here some years ago. This line of speculation, however, is hardly germane to Dr. Andrews’s matter.

Dr. Andrews hardly ever makes conjectures on his own account, and is generally a safe guide. He would have escaped one small puzzle (p. 91, note 1, on Bede's *possessio* = *bócland*) if he had remembered that Teutonic law knows nothing of the Roman *dominium*, and that in the official Latin of Western clerks down to the Carolingian period the highest possible degree of ownership is regularly expressed by *possessio* or *potestas* and their cognate words.

F. P.

*The Theory and Practice of Private International Law.* By L. VON BAR. Second Edition, Revised and Enlarged. Translated by G. R. GILLESPIE. 1892. Edinburgh: William Green & Sons. La. 8vo. xlvii and 1162 pp.

PROFESSOR L. VON BAR's work on Private International Law was first published in 1862, the first English translation, that by Mr. Gillespie, appearing in 1883. Dr. Bar published his second edition in 1889, and is followed by Mr. Gillespie at a much shorter interval—a demonstration of the author's repute and of the increased importance of this department of law. The present book is rather a new treatise than a new edition. One subject—international criminal law—formerly included, is now omitted, but, on the other hand, not only are upwards of half a hundred pages given to 'copyright' and 'industrial property,' before unnoticed, but the residue, and more particularly 'nationality,' commercial law, including maritime law, and the subjects of territorial waters and extra-territoriality are discussed with completeness of detail where before there was but little more than a bare principle.

That portion of the work which relates to copyright, patents, trade-marks, designs, trade-names, and merchandise marks is peculiarly interesting as, examining the clauses of the international conventions in the light of previous continental opinions and decisions, it will, as English cases on the construction of the statutes and Orders in Council increase, enable the curious to appreciate the practical working of such treaties, the language of which, frequently drawn to meet continental understandings of the laws comes to be interpreted by English judges with the aid of precedent, establishing what it is possible that Professor von Bar might designate as arbitrary rules with arbitrary exceptions.

For purposes of the application of law in England, the perusal of the Seventh Book—the Law of Obligations—will afford the most instruction. Here the author comes nearer to English principles than elsewhere, and also treats, at a length by no means disproportionate to the value of the matter, some questions as to which English authority is scarce. It is to be remarked that Professor von Bar maintains that, in certain circumstances, compliance with the law which governs its substance ought to be sufficient for the form of a contract. English law has gone much further than that as to the execution of testamentary instruments, and if, in matters of contract, we adhere too strictly to the maxim '*locus regit actum*,' there may arise, when much business is done hurriedly, much by travellers, much by telegram and telephone, a danger of the sacrifice of substantial justice to a rule useful as a general rule, but not of convenient application to all facts, and difficult to defend on principle apart from authority.

A paragraph and note at page 1068 suggest the reflection that if the ingenuity of mechanical engineers solves the problem of making aerial navigation practicable, lawyers may have to exercise themselves with some pretty points.

Mr. Gillespie's translation of the earlier edition is the best comment on the like difficult and laborious task which he has performed in respect of the present issue. The notes, appended in square brackets, in the same place and type as the text, are primarily intended for Scottish lawyers, but will be found of considerable use in England, notwithstanding a tendency to omit recent cases.

It is suggested to the editor that he might, perhaps, devise a more convenient plan for separating the text of the author from his own comment, in five places (pp. 290, 336, 771, 1125 and 1129), besides a sixth noted in the errata, there is a bracket omitted either at the beginning or end of a note, or entirely, and there may be more. Apart from accidents of that sort, it would be difficult for one consulting the book casually, and under pressure as to time, to ascertain what was text and what note.

If the learned reader buys this book he will have his reward when he has read it.

H. N.

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*The Scottish Poor Laws.* By R. P. LAMOND. Glasgow: Wm. Hodge & Co. 1892. 8vo. xvi and 398 pp.

THIS is something more than a mere law-book. It contains indeed sufficient information upon the various points with which the Courts have had to deal in relation to the poor; but the author further enters fully into the whole subject of the administration of the poor-laws, and brings much information to bear upon the discussion of questions of legislation.

To those familiar only with the English Poor Laws, it will perhaps be a surprise to learn that it is still the law in Scotland—a point of law not long ago settled by the highest authority on appeal to the House of Lords—that the able-bodied poor with their families have no right to relief out of the rates; and further that the persons who administer the funds under the poor-laws have no discretion to apply any part of the funds to the relief of the able-bodied. This was a principle of which the authorities of a now past generation—notably Dr. Chalmers—were very tenacious. Whether it can be long maintained under modern conditions, and perhaps less sturdy modern sentiments, is a question to which the author contributes some interesting suggestions.

In two concluding chapters, which will well repay the perusal, the author adverts to the problem of the limits of State interference, discusses various modern schemes for State-aided pensions and the like, and considers the true functions of charity in relation to the poor law.

R. C.

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*A Treatise on the Principles of the Law of Compensation.* By C. H. CRIPPS, Q.C. London: Stevens & Sons, Lim. 1892. Third Edition. 8vo. lxiii and 532 pp. (20s.)

SINCE the second edition of this work was issued in 1884, three important legal events in connection with its subject have happened. The Arbitration Act (1889) has been passed; the *Stockport* case, 33 L. J., Q. B. 251, has been affirmed by the House of Lords in *Couper Essex v. Acton Local Board*, 14 App. Cas. 153; and the Parliamentary Deposits and Bonds Act (1892) has been passed. The Arbitration Act has been remarkably well worked in, but Mr. Cripps has unhappily refrained from commenting generally on sect. 24, which applies the provision of that Act except *so far as they are*

*inconsistent* with the Lands Clauses Act, though he lays down, and we think correctly, on a particular point, that the Court or a Judge would probably not apply the 12th section of the Act in any case in which there is a *bona fide* question raised either as to the right to claim compensation, or as to the title of the claimant. The *Cowper Essex* case is also treated very well, our author merely stating its effect with becoming brevity, and sparing us any dissertations upon the curious conflict of judicial opinion as to the correctness of the *Stockport* case, which lasted for nearly thirty years.

On the Parliamentary Bonds and Deposits Act, 1892, we have not a word. This is of course excusable, as the date of the Act synchronizes with that of Mr. Cripps' preface. But though it may not have been worth while to keep back the book in order to include the Act, we think the omission to notice the long existing Parliamentary Standing Orders which it has turned into statute law is somewhat of a defect. The next chapter, treating of 'modifications of the Lands Clauses Acts,' by the Allotments and other Acts—including the Small Holdings Act, 1892 (wrongly cited as the Small Agricultural Holdings Act) would have been just the place for a notice of the Standing Orders on which the Parliamentary Bonds and Deposits Act is founded.

Beyond doubt, however, we have here a good book, well edited. We learn from the preface that some chapters have been to a great extent re-written, and that Mr. W. F. Craies has helped the author throughout in the preparation of the present edition. There is a full table of cases with references to all the reports, and a good collection of forms, which are as many as sixty in number. The Lands Clauses Acts, together with selections from the Housing of the Working Classes Act, are printed in the Appendix, and we are glad to observe that the preamble to the parent Act of 1845, so senselessly repealed for Statute Law Revision purposes, has been retained.

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*The Law of Horses.* By D. ROSS STEWART. Edinburgh: W. Green & Sons. 1892. 8vo. xx and 280 pp.

WHEN Dr. Johnson defined oats as the food of men in Scotland and horses in England, Lord Elibank added, 'And where will you find finer men and finer horses?' Scotland, like Ithaca, is more famous for its men than its horses, yet we have only to glance through Mr. Stewart's work to see how large a body of law even in Scotland may grow up around a useful quadruped that like the horse figures in so many relations of life—that may be bought and sold, and hired and hypothecated, and sent by sea and land, and insured, and vivisected, and finally eaten under statutory conditions. In treating these matters Mr. Stewart has produced a really model textbook, well arranged, exact, exhaustive, concise, and clear, improved by all the mechanical aids of good paper, clear type, and conspicuous catch-words. Last, not least, all the cases are dated. Allowing for technical terms of Scotch law there is little difference between the substantive law in Scotland and England. A hirer of a horse in Scotland, however, had better remember that if the horse is injured while in his possession the burden is on him to prove that it was not his fault; also that if he hires a horse for a ride on the road he must not take it for a gallop in a grass field (*Seton v. Paterson*, 1880, 8 R. 236).

Travellers should note that a Scotch smith is not bound like an English smith to shoe a horse which is brought to him. A buyer too must beware of buying a stolen horse in Scotland: for in such a case the '*vitium reale*'

follows the horse into the hands of even a purchaser for value in market overt: in fact the buyer cannot be too wide awake, for whatever else the countries may differ in they are alike in the frailty that attends horse bargains. It is to be feared that this was an early as it certainly is a later British characteristic, for do we not find Cicero writing 'Tu qui caeteris cavere didicisti, in Britannia ne ab essedariis decipiaris caveto?' The horse, it must be admitted, himself encourages frauds by his susceptibility to all sorts of complaints, latent and patent—complaints which the enterprising horse-dealer is obliged to disguise by 'gingering' and 'plugging' and 'pegging' and 'bishoping,' and other questionable arts. It is here we come upon the most material difference between the English and Scotch law. In England a warranty is a collateral contract, in Scotland it is an essential condition forming part of the contract for sale. Hence the Scotch buyer with a warranty of soundness cannot keep the horse with an abatement of the price. His only remedy is return.

The veterinary slang incident to this topic (and no blame to Mr. Stewart) is at times puzzling, especially when mixed with racy Scotticisms. We know, for instance, what is a roup, from recollections of Guy Mannering, but what is a 'slump price' and a 'white bonnet,' unless it is a puffer at an auction? Perhaps in a second edition of his excellent book Mr. Stewart will give us a glossary.

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*The Contract of Sale in the Civil Law with references to the Laws of England, Scotland and France.* By J. B. MOYLE. Oxford: Clarendon Press. 1892. 8vo. xiii and 271 pp. (10s. 6d.)

*The Roman Law of Sale with modern illustrations. Digest XVIII. 1 and XIX. 1 translated with notes and references to Cases and the Sale of Goods Bill.* By JAMES MACKINTOSH. Edinburgh: T. & T. Clark. 1892. 8vo. xv and 272 pp.

THE first of these books is written by the learned editor of the Institutes of Justinian. The 'experiment,' as he modestly calls it, is a very successful attempt to expound the law of Sale as laid down in the Corpus Iuris for the benefit of English lawyers. The general scheme of the book is to discuss the civil law in the text, and to point out the analogies with, and the differences from, English, Scotch and French law in the notes. The author is evidently a well-read and accomplished lawyer; his style is charming and his statement of the law is accurate.

The notes in the second of these books are intended to obviate the want of logical sequence in the discussion of topics in the Digest, and contain not only explanations adapted to the use of students of the Civil Law but useful comparisons of the Civil with the English and Scotch Law. We may safely congratulate the author on the accuracy and skill with which he has performed his task.

Students in the Inns of Court are compelled to pass an examination in Civil Law. To many of them this is most distasteful; the time that they spend in learning Civil Law seems to them to be lost; they do not see the connection between Civil and English Law. The student, however, who reads either of these books will find that while he learns Civil Law he also learns English Law.

These books bring out very clearly one of the fundamental differences between English and Civil Law, namely, that there are comparatively few technical terms in English Law. We distinguish between 'Emptio generis,'

'*Emptio spei*,' '*Emptio rei speratae*,' '*Emptio ad gustum*,' '*Emptio per aversionem*,' and '*Emptio ad mensuram*,' but we have no technical words to describe these different manners of sale.

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*The Corporation Duty.* By MORTON S. JACKSON. London: Stevens & Sons, Lim. 1892. 8vo. viii and 220 pp. (7s. 6d.)

MR. JACKSON has not only a unique knowledge of the Corporation Duty, its origin, history, and working, but a lively style of writing which makes even a dry subject excellent reading.

The Corporation Duty, as most people know, was designed to end the 'indefensible immunity,' as Mr. Hubbard called it, of corporations to succession duty. It was a just tax, but it was a novel one, and the Legislature proceeding tentatively, as is the wont of the British Legislature, was over-liberal in the matter of exemptions. The result is that, what with excusing Friendly Societies and Trading Companies, and Local and Municipal Bodies, and Charitable and Religious and Literary and Scientific and Fine Art Associations, there is very little left to tax. Hence, though the annual income of corporations is over nine millions, the tax only produces some £40,000. Mr. Jackson evidently regards the present Act as only introducing the thin edge of the wedge, and discusses what he euphemistically calls 'the future possibilities' of the Duty; in other words, by a trifling omission of a few words, he offers the Chancellor of the Exchequer a quarter of a million instead of £40,000. This is tempting, for Mr. Jackson knows what he is talking about. It is time the 'exemptions' looked after themselves.

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*Commentaries on Equity Jurisprudence.* By the Hon. Mr. Justice STORY. Second English Edition by W. E. GRIGSBY. London: Stevens & Haynes. 1892. La. 8vo. xcvi and 1090 pp. (45s.)

STORY's work has become a classic, and has passed beyond the zone of criticism. But Story's work in English garb has no such immunity. In Dr. Grigsby's laborious hands it has developed into a great book, we will not say a great evil. We have some difficulty in saying for what class of readers—practitioners or students—it is meant. Practising lawyers are more apt to turn to treatises on special subjects as their happy hunting-grounds. Students will be energetic indeed if they plod their way through eleven hundred closely-printed pages. This question however *solvitur ambulando*. The lapse of eight years calls for a new edition of the Anglicised Story which lies before us. The American cases and the paragraphs founded upon them have been eliminated by Dr. Grigsby, leaving nothing but Story as he may be quoted in the English Courts. Dr. Grigsby has done his work of editing and revising carefully, and on the whole well. But we think the judicial list with which the book is 'further enriched' (we quote the preface) might be brought down later than 1887 when the preface is dated June, 1892, and we should like to see more quotations from modern cases as distinguished from the old decisions to which it is difficult for student or practitioner to refer with profit. The man who quotes a single readable case quite upon the point does a far greater service than the man who accumulates a mass of authorities more or less ancient and more or less relevant.



*The Statute Law of the Limitation of Actions.* By HENRY THOMAS BANNING. Second Edition, revised and enlarged. London: Stevens & Haynes. 1892. 8vo. xxxix and 385 pp. (16s.)

HAPPY is the subject the statutory portion of which is contained in forty pages of moderate dimensions. This is the case with the Statute Law of Limitation, no fraction of which, however minute, seems to have escaped Mr. Banning's ken. His treatise represents the case law upon the subject, and he refers to about a thousand decisions. He refers to them in a clear and succinct fashion, and the only thing he leaves to be desired is the date of each case. One page (p. 48) reminds us in appearance of an old 'Bill in Chancery,' in which letters used to be set out *verbatim* with their 'yours obediently' and 'your humble servant' in full. But this and a few mechanical slips are small things, detracting little from the sterling merits of a work which has profited by its fifteen years of legal career.

*Practice in Lunacy.* By JOSEPH ELMER. Seventh Edition. London: Stevens & Sons, Lmt'd. 1892. 8vo. xx and 481 pp.

OF a book of practice which has run into a seventh edition in the hands of an official of the department in which the practice lies, it is unnecessary to say much. The success of such a book tells its own tale. It is found accurate and useful, or it would not flourish so well. It is natural to find a new edition of 'Elmer' called into being by the Lunacy Acts of the last two years, and it is equally natural for those accustomed to 'Elmer' to find it as carefully compiled and lucidly arranged as ever.

*Die Behandlung der verwahrlosten und verbrecherischen Jugend und Vorschläge zur Reform.* Von Dr. P. F. ASCHROTT. Berlin: Otto Liebmann. 1892. 8vo. iv and 64 pp.

THE author of this pamphlet on the treatment of youthful criminals, whose excellent works on the English Poor Law and on Punishments in English Criminal Law have been noticed in this REVIEW, is one of the best informed and most capable members of the school of criminal lawyers, led by Professor von Liszt, who advocate a clearer recognition of the distinction between casual and habitual criminals and wish to promote legislation which will, as far as possible, prevent individuals belonging to the former from drifting into the latter class. Among the measures intending to carry out that object those dealing with the mode of punishing and reforming offenders of immature age must naturally occupy a prominent place. Dr. Aschrott's suggestions deserve the careful attention of criminal lawyers and laymen who take an interest in the administration of criminal law.

*Die Tierquälerei in der Strafgesetzgebung des In- und Auslandes, &c.* Von Dr. JUR. ROBERT VON HIPPEL. Berlin: Otto Liebmann. 1891. 8vo. viii and 198 pp.

THIS book gives an account of the statutory provisions relating to the prevention of cruelty to animals in Germany and other countries, and makes suggestions as to future legislation in Germany. The author in his reproduction of 12 & 13 Vict. c. 92 should have omitted the sections repealed by the Summary Jurisdiction Act 1884.

*A Treatise upon the Employers' Liability Act of New South Wales.* By C. G. WADE. Sydney: C. F. Maxwell. 1891. 8vo. xvi and 210 pp. (12s. 6d.)

THE New South Wales Act of 1891 differs little, and perhaps not essentially in any respect, from the English Act of 1880. Nor does it appear that the Colonial Courts have yet contributed much to the inevitable judicial commentary on the Act. The above work therefore differs little from the ordinary type of commentary upon a modern statute. The English decisions are freely cited, and the book may be useful to the English lawyer desirous of having this branch of the law brought up to date.

We have also received—

*Church Law: being a Concise Dictionary of Statutes, Canons, Regulations, and Decided Cases affecting the Clergy and Laity.* By BENJAMIN WHITEHEAD. London: Stevens & Sons, Lim. 1892. viii and 304 pp. (10s. 6d.)—This book consists of notes on various points of Ecclesiastical law, arranged in Dictionary form. It cannot supply the place of 'Phillimore' or 'Cripps' to the practising barrister, but it would be a very good thing if the bishops would insist on their clergy each possessing a copy, as the price is only 10s. 6d., and the book contains a great deal of information of practical value.

*Public Finance.* By C. F. BASTABLE. London: Macmillan & Co. 1892. 8vo. xviii and 672 pp. (12s. 6d.)—This full and elaborate work has a legal aspect by reason of some chapters on the holding and administration of property by the State, and a series of chapters on taxation. Continental readers, for whom legal and political science are less distinct than for us, would probably classify it without more ado as a book on Public Law. This debatable ground between law, politics, and history, has received too little attention from English writers until quite lately. This book ought to be a valuable companion to Mr. H. Sidgwick's *Elements of Politics*, which lately broke new ground in this direction.

*Traité élémentaire de droit civil germanique.* Par ERNEST LEHR. Tome second. Paris: E. Plon Nourrit et Cie. 1892. 518 pp.—M. Lehr, who is honorary professor of comparative law of the University of Lausanne, and formerly lectured there, requires no introduction to those who study foreign law. Apart from his work in International law his books on English, German, Spanish, and Russian law are well known to all for whom French is the more convenient medium for obtaining information on these subjects.

The present volume deals with the law of contract of the family and of successions. The author has drawn into his analysis the changes and proposals of the German Draft Civil Code, and he has not omitted to preface each subject with historical notes, without which Germanic law would only appear as a muddled survival. There is a full index.

*Sommaire périodique des Revues de Droit: 2<sup>e</sup> Année, No. 4, Avril 1892.* Brussels: F. Larcier.—This publication is described as 'Table mensuelle de tous les articles et études juridiques publiés dans les périodiques belges et étrangers,' and professes to analyse the contents of more than two hundred legal periodicals. The work has every appearance of being carefully and methodically done, and the 'Sommaire périodique' should certainly find a place in all public law libraries. It will be useful to many Continental and to some English-speaking students.

*De l'assurance contre les accidents du travail.* Par VILLETARD DE PRUNIÈRES. Paris: Chevalier-Marescq et Cie. 1892. 458 pp.—The author of this treatise on a subject which is daily gaining importance has done good work in dealing so fully with all aspects of the subject. The question is still in a state when theory is welcome. It is therefore no objection to the book before us if alongside the law as applied in France it deals with the different schemes of reform which have been propounded. There is no index, though there is a full analytical table.

*A Treatise on the Negligence of Municipal Corporations.* By D. A. JONES. New York: Baker, Voorhis & Co. 1892. La. 8vo. lxxviii and 588 pp. (\$6.00 net).

*Principles of the Criminal Law.* By SEYMOUR F. HARRIS. Sixth Edition. By C. L. ATTENBOROUGH. London: Stevens & Haynes. 1892. 8vo. xxxix and 606 pp.

*The Revised Reports.* Edited by Sir FREDERICK POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. V. 1799-1801. 5 & 6 Vesey (to p. 616)—8 T. R.—1 East (to p. 138)—2 Bos. & P.—Forrest—1 & 2 Espinasse. London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co., 1892. La. 8vo. xiii and 798 pp. (25s.)

*The Law relating to Building Societies.* By E. A. WURTZBURG. Second Edition. London: Stevens & Sons, Lim. 1892. 8vo. xvi and 407 pp. (14s.)

*The Law of Torts.* By Sir FREDERICK POLLOCK, Bart. Third Edition. London: Stevens & Sons, Lim. 1892. 8vo. xl and 624 pp. (21s.)

*The Law and Custom of the Constitution.* Part I. Parliament. By Sir W. R. ANSON, Bart. Second Edition. Oxford: Clarendon Press. 1892. 8vo. xviii and 375 pp. (12s. 6d.)

*Principles of the Law of Real Property.* By the late JOSHUA WILLIAMS, Q.C. Seventeenth Edition, re-arranged and partly re-written by T. CYPRIAN WILLIAMS. London: Sweet & Maxwell, Lim. 1892. 8vo. lx and 703 pp. (21s.)

*An Introduction to the History of the Law of Real Property.* By KENELM E. DIGBY. Fourth Edition. Oxford: Clarendon Press. 1892. 8vo. xiv and 446 pp. (12s. 6d.)

*A Manual of the Law relating to Small Agricultural Holdings, with The Small Holdings Act, 1892.* By C. D. FORSTER. London: Stevens & Sons, Lim. 1892. 12mo. viii and 84 pp. (2s. 6d.)

*The Statutes of Practical Utility.* (1892.) Alphabetically arranged, with notes thereon, by J. M. LELY. Vol. III. Part 2. London: Sweet & Maxwell, Lim. and Stevens & Sons, Lim. 1892. 8vo. 295-601 pp. (12s.)

*A Practical Treatise on the Law of Reparation.* By A. T. GLEGG. Edinburgh: W. Green & Sons. 1892. La. 8vo. lvi and 551 pp. (25s.)

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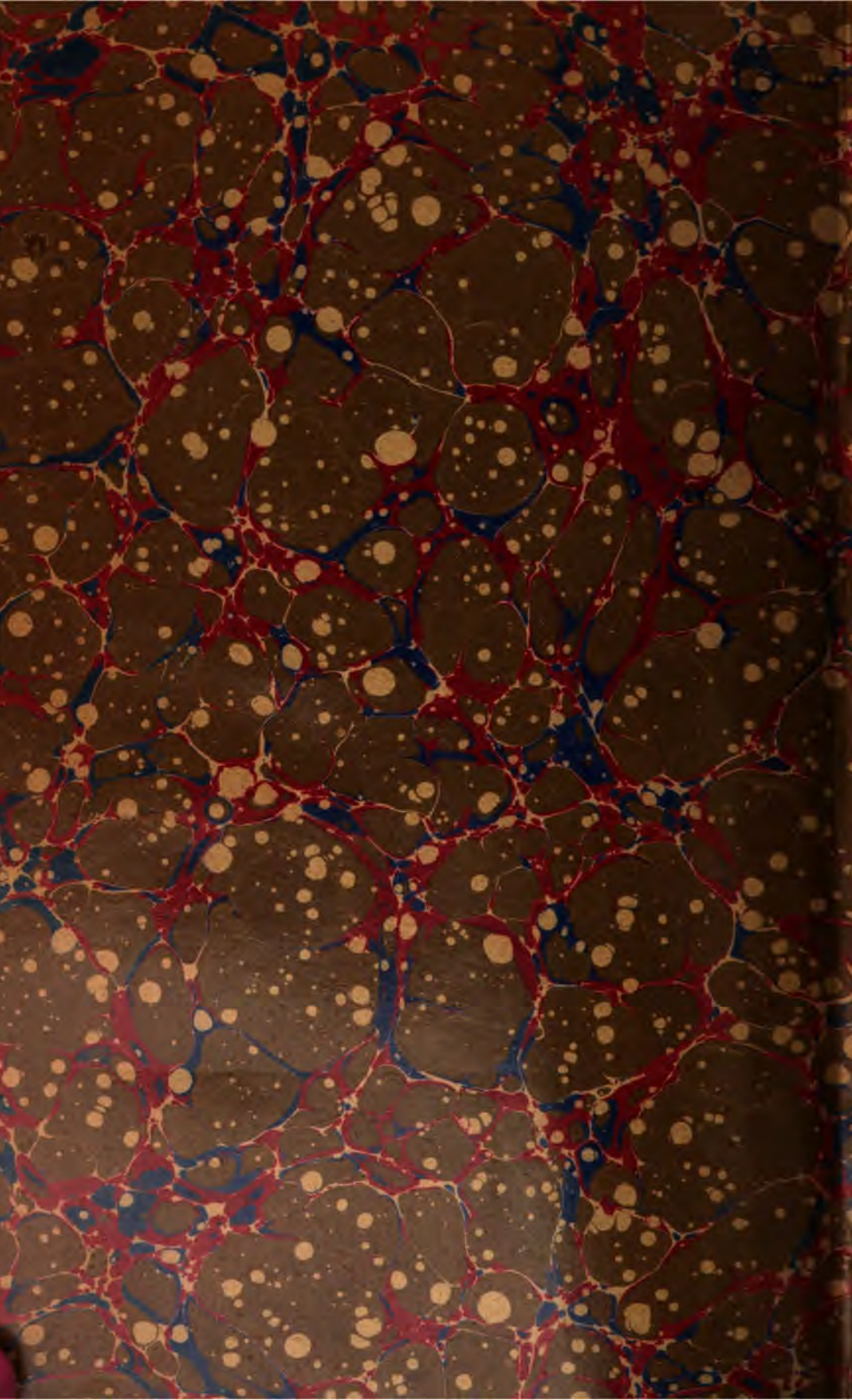




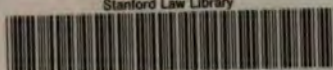








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